No. 92-8

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BODINE'S INC.,

Petitioner,

v.

PAT GORDON, CATHERINE THOMAS, SAM GORDON, and MICHELLE CHROMAN, on behalf of herself and as next friend for her minor children, ADAM CHROMAN and MELISSA CHROMAN, individually and on behalf of all others similarly situated, EDWARD BODEN, SR., EDWARD BODEN, JR., ROGER J. WALSH, JR., DOMINICK'S FINER FOODS, INC., CERTIFIED GROCERS WAREHOUSE, INC., and TREASURE ISLAND FOODS, INC., individually and as representatives of a class; and the KROGER CO.,

Respondents.

Petition for Writ of Certiorari to the Illinois Appellate Court, First Judicial District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state court in a nationwide class action, consistent with the due process clause of the Fourteenth Amendment, can apply fluid recovery even though numerous federal circuit courts of appeal have already held fluid recovery to be unconstitutional?

2. Whether a state court in a nationwide class action, consistent with the due process clause of the Fourteenth Amendment, can apply fluid recovery to determine aggregate damages to the class as a whole, even though (1) class members may not be notified of the pendency of the action, if at all, until after both liability and aggregate damages are determined; (2) many class members have no contacts with the forum state; and (3) many of the claims arose in other states and the forum has no significant interest in them, in violation of *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985)?

3. Whether a state court in a class action, consistent with the due process clause of the Fourteenth Amendment, can apply fluid recovery for penal purposes without according litigants their rights under the Fifth and Sixth Amendments?

4. Whether a state court in a class action, in an attempt to fulfill state objectives, consistent with the Supremacy Clause of Article VI, can apply fluid recovery to relieve class members of their burden of proving individual damages in an action for civil damages under Section 1964 of the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1964, when that statute provides relief only when such damages can be established?

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PETITION FOR WRIT OF CERTIORARI

To The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Petitioner Bodine's, Inc. ("Petitioner")[1] prays that a writ of certiorari issue to the Illinois Appellate Court, First Judicial District:

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[1] Petitioner's statement pursuant to Supreme Court Rule 29.1 is set forth in the Appendix at page A56.

OPINIONS BELOW

The opinion of the Illinois Appellate Court is set forth in the Appendix at page A1. The unpublished order of the Circuit Court of Cook County, First District, is set forth at page A17 of the Appendix. The order of the Illinois Supreme Court denying the petition for appeal is set forth at page A16 of the Appendix.

JURISDICTION

The judgment of the Illinois Appellate Court was entered on December 26, 1991, affirming the ruling of the Circuit Court of Cook County, First District, Chancery Division, dated December 7, 1990. The Illinois Supreme Court denied a petition to appeal as a matter of right, or alternatively, for leave to appeal, on March 27, 1992. The jurisdiction of the Court is under 28 U.S.C. § 1257.

STATEMENT OF THE CASE

In July, 1989, this nationwide class action was filed against the manufacturer and retailer of orange juice labeled as 100% pure, but allegedly containing substitutes. The Third Amended Complaint (the "Complaint") (A20) seeks damages for economic loss on behalf of each putative class member for each allegedly adulterated product that he may have purchased under theories of Illinois common law fraud, the Consumer Fraud and Deceptive Business Practices Act, Ill. Rev. Stat. ch. 121-1/2, ¶ 280 (1989) and similar acts in every other state, and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964 (1988) ("RICO").

The Complaint claims that Petitioner manufactured the allegedly adulterated juice from 1978 to 1985,[2] and that the product was marketed in at least thirty-six states to more than 100 supermarket chains under fifty brand names. Many supermarkets bought this juice, along with juice from other manufacturers, which they then sold under their house labels. Therefore, most of the juice Petitioner sold could not be identified by the consumer as being Petitioner's juice. Moreover, the nationwide class is, and likely will remain, utterly unidentifiable. Counsel for the class and the Illinois courts have attempted to bypass this problem by creating a "fluid recovery."

As envisioned by the lower courts, fluid recovery employs various mechanisms to assess the damage to the class as a whole, and then to distribute this damage fund in a manner most likely to benefit the injured population. Thus, in this case, liability and damages will be determined solely by examining Petitioner's records. Moreover, fluid recovery will dispense with giving notice of the pending action to plaintiff class members until after liability is determined, and class members need not make individual claims until that time.

On December 7, 1990, the trial court certified the following question for review:

> Whether what is commonly known as "fluid recovery" (various mechanisms involving the assessment of damages to the class as a whole followed by its

---

[2] Petitioner, Bodine's, Inc., was purchased in 1985 by McCain USA, Inc. McCain USA had no knowledge of or involvement in the conduct of the individual defendants—former directors, officers and shareholders, Edward Boden, Sr., Edward Boden, Jr. and Roger J. Walsh. Further, McCain cooperated fully with federal authorities' investigation of the former owners. There are *no* allegations that the current owner of Bodine's, Inc. engaged in any wrongdoing.

> distribution in the manner most likely to result in benefit to the injured population) is permissible in a class action in Illinois.

The trial court noted that thousands or millions of claims would be defeated if fluid recovery were not available as a means to certify the class. (Trial Ct. Order, A18). The Illinois Appellate Court granted leave to appeal and upheld the trial court's certification of the class, relying heavily on the *dicta* of *Simer v. Rios*, 661 F.2d 655 (7th Cir. 1981), *cert. denied*, 456 U.S. 917 (1982). The court held that fluid recovery was permissible and constitutional in an Illinois class action suit. On March 27, 1992, the Illinois Supreme Court denied Petitioner's petition for appeal.

ARGUMENT

I.

THE COURT SHOULD GRANT REVIEW BECAUSE THE ILLINOIS APPELLATE COURT HAS EMPLOYED A MECHANISM—FLUID RECOVERY—THAT HAS BEEN FOUND BY NUMEROUS FEDERAL COURTS TO VIOLATE DUE PROCESS

The decision of the Illinois Appellate Court is the first Illinois case expressly to uphold and implement fluid class recovery against constitutional challenge. Unless this Court exercises review at this point, there is a serious danger that the state court's decision will stand as precedent for future litigation, will encourage lawyers to file nationwide class actions, and will promote the perception that the state judiciary may do what the federal judiciary must not do—infer federal statutory remedies which Congress never provided. Numerous federal courts have found fluid class recovery unconstitutional. This Court should grant review to preserve consistency in the federal courts' decisions and prevent uncertainty in the application of federal law. Otherwise, future plaintiffs will engage in forum

shopping to avail themselves of one state's interpretation of federal law, avoid another state's interpretation, and evade what will be received as the more limited power of the federal judiciary.

The Illinois courts adopted fluid recovery "to avoid expected manageability problems" in large class actions, by calculating and distributing damages through the following mechanism:

> "(1) the amount of damages incurred by the *class as a whole* is determined in a single adjudication, creating a damage fund; (2) individual member claimants *capable* of proving valid claims obtain their share of the fund; and (3) the unclaimed portion of the fund is applied to the class's benefit. [Citation.]"
>
> The third procedural step is the actual fluid recovery, which commonly assumes one of two forms. The remainder of the fund is: (1) distributed through the market, usually in the form of reduced charges, or (2) used to fund a project which will likely benefit class members. *Simer*, 661 F.2d at 675; *Cicelski*, 132 Mich. App. at 305, 348 N.W.2d at 689; see generally Note, *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1516-23 (1976).

(App. Ct. Op., A12-13, quoting *Cicelski v. Sears Roebuck & Co.*, 132 Mich. App. 298, 304-05, 348 N.W.2d 685, 689 (1984)) (emphasis added).

Fluid recovery employs a method of calculation which wholly relieves class members of the initial burden of proving individual damages. Rather, damages to society as a whole are calculated and distributed, absent individual proof of harm. In fact, under this mechanism, no individual claimant would even be required to show an injury until *after* liability and damages have been assessed against Petitioner. Potentially, *no individual* injury need ever be proven, yet damages would still be granted, because the public would receive any portion of the "fund"

unclaimed by "claimants *capable* of proving valid claims." (A.13). This unclaimed portion could conceivably encompass the entire fund. Consequently, Petitioner is punished, even though injury to no individual plaintiff may ever be proven.

For those reasons, numerous courts of appeal have found fluid recovery to violate due process. The leading case finding fluid class recovery to be unconstitutional is *Eisen v. Carlisle and Jacquelin*, 479 F.2d 1005 (2nd Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974). *Eisen* was an antitrust action brought on behalf of all odd-lot investors against two brokerage firms and the New York Stock Exchange. The plaintiff sought to maintain the action as a class of such investors during a four-year period. The Second Circuit refused to certify the class, finding it utterly unmanageable. *Eisen*, 479 F.2d at 1008.

In denying the class, the court unequivocally rejected the "fluid recovery" plan designed by the district court to control an otherwise unmanageable class. The Court of Appeals found fluid recovery to be a "fantastic procedure" and an "unconstitutional violation of the requirement of due process of law." It held the " 'fluid recovery' concept and practice to be illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper." *Id.* at 1018.

The Fourth Circuit is in accord with *Eisen* in finding fluid recovery unconstitutional. *See Windham v. American Brands, Inc.*, 565 F.2d 59, 72 (4th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978) (citing *Eisen*, 479 F.2d at 1018). The *Windham* plaintiffs sought a class certification of growers of flue-cured tobacco in South Carolina based on allegations of antitrust violations. *Windham*, 565 F.2d at 64. The court, however, refused to certify the class, finding the action unmanageable. In light of the magnitude of the class size, the court found that "computation of damages would be a complex, highly individualized task, imposing

an intolerable burden on the judicial system." *Windham*, 565 F.2d at 70.

Fluid recovery was proposed by the *Windham* plaintiffs as a solution to these insurmountable manageability problems, but was squarely rejected by the court as an unconstitutional violation of due process:

> Nor, as the district judge held, can the difficulties inherent in proving individual damages be avoided by the use of a form of "fluid recovery." Such a method of computing damages in a class action has been appropriately branded as illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper.

Id. at 72, citing *Eisen*, 479 F.2d at 1018.

Like the Second and Fourth Circuits, the Ninth Circuit has found fluid class recovery to be unconstitutional. *See In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974). The *In re Hotel* plaintiff sought certification for a class of approximately four million persons who allegedly paid an illegal surcharge for telephone services due to a conspiracy between forty-seven hotel chains and six hundred individual hotels. *Id.* at 88. The plaintiffs argued that fluid recovery should be implemented to aggregate the damages of the individuals into a single claim. The court rejected the method and refused to certify the class, relying on the *Eisen* decision.

Yet, despite this strong federal court authority, the Illinois Appellate Court below failed even to address the constitutional problems created by fluid recovery. Indeed, nowhere in its opinion does the Appellate Court distinguish or even cite *Eisen*, *Windham*, or their progeny. Instead, the Appellate Court merely affirmed the trial court's embrace of the *Eisen* district court's rationale—that fluid recovery can dispense with individual proof of damages to

cure manageability problems. In addressing the Defendant's arguments that the class was unmanageable and the class action inappropriate, the panel below parroted reasoning already rejected by the Second Circuit in *Eisen* as unconstitutional. The panel noted, ". . . in the trial court's order granting class certification, the court approved the use of fluid recovery to *avoid the expected manageability problems*." (App. Ct. Op., A12) (emphasis added).

The Illinois Appellate Court based its application of fluid recovery upon *Simer v. Rios*, 661 F.2d 655 (7th Cir. 1981), *cert. denied*, 456 U.S. 917 (1982), a case which *refused to apply fluid recovery* in a non-certified class *settlement*. Nonetheless, the panel quoted *Simer* with approval:

> "The general inquiry is whether the use of [the fluid recovery] mechanism is consistent with the policy or policies reflected by the statute violated. This matter can be more particularized into an assessment of to what extent the statute embodies policies of deterrence, disgorgement, and compensation." (Footnotes omitted.) *Simer*, 661 F.2d at 676, quoted in *Cicelski v. Sears, Roebuck & Co.*, 132 Mich. App. 298, 307, 348 N.W.2d 685, 690-691 (1984).

(App. Ct. Op., A14). The court below apparently interpreted *Simer* as federal constitutional support for fluid class recovery.

Thus, the Illinois Appellate Court embraced the language of the Seventh Circuit in *Simer*, but utterly disregarded federal law in the Second, Fourth and Ninth Circuits finding fluid recovery unconstitutional. The Illinois Appellate Court's reading of *Simer*, at the very least, creates significant uncertainty in the law as to the constitutionality of fluid recovery.

II.

FLUID RECOVERY VIOLATES THE DUE PROCESS RIGHTS OF BOTH PETITIONER AND ABSENT CLASS MEMBERS BY FAILING TO PROVIDE NOTICE

The Illinois Appellate Court approved the use of fluid recovery to assess damages to the class as a whole, without making any provision for adequate notice to all class members prior to an adjudication on the merits. Such a procedure unconstitutionally deprives absent class members of notice, would bar absent out-of-state plaintiffs from bringing suit in their home states, and would effectively prevent such class members from participating in litigation and receiving compensation. Fluid recovery would lead to unconstitutional results.

Proper notice and the opportunity to be heard are fundamental elements of one's due process rights under the United States Constitution. U.S. Const. amend. XIV. This Court has held: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the *pendency* of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (emphasis added). *See also Client Follow-Up Co. v. Hynes*, 105 Ill. App. 3d 619, 434 N.E.2d 485, 489-90 (1982) (citing *Mullane*, 339 U.S. 306 (1950)).

The proposed use of fluid recovery in this case would dispense with notice. Plaintiffs seek to skirt the essential element of notice and opportunity to be heard by delaying notice to absent class members until after the court has determined liability and aggregate damages to the class as a whole. Plaintiffs, in short, place due process on the back burner. This is but a pretext for ignoring the notice requirements altogether, postulating that class

members will be notified *after* damages are aggregated, and their attorneys' contingency calculated. Such a practice certainly is not "notice reasonably calculated . . . to apprise interested parties of the *pendency* of the action[.]" *Mullane*, 339 U.S. at 314 (emphasis added). Indeed, as one court has stated: "To give notice to class members after a decision on the merits is to give notice after the reasons for giving it have ceased to exist." *Client Follow-Up*, 105 Ill. App. 3d at 627, 434 N.E.2d at 490.

Adequate notice to putative class members is essential because that single proceeding will bind all class members—even those who remain absent—as a final adjudication on the merits. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805-06 (1985). The fluid recovery mechanism approved by the lower court dispenses with notice and in doing so violates absent class members' right to due process. Without affording absent class members due process, Illinois courts may not exercise jurisdiction.

III.

THE ILLINOIS APPELLATE COURT'S APPROACH IS ENTIRELY INCONSISTENT WITH THIS COURT'S PRECEDENT IN *PHILLIPS PETROLEUM v. SHUTTS*

This Court has held that absent plaintiffs in a class action are entitled to due process protection, particularly in multi-state actions where other states may have an interest in applying their own laws. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). Without providing such protection, Illinois courts lack authority to decide this case. *Id.*

The Illinois courts may not assert personal jurisdiction over absent class members without proper notice or evidence of sufficient contacts to Illinois, and any attempt to do so is directly contrary to *Phillips Petroleum*. *See Phillips Petroleum*, 472 U.S. at 811-12. The present litiga-

tion encompasses a nationwide class of diverse members, scattered about the country, linked only by their consumption of Petitioner's orange juice over a decade ago. Undoubtedly, many of these consumers neither reside in Illinois, nor would they choose to litigate an action in Illinois. Nonetheless, the judgment of a Cook County trial court will be *res judicata*, barring all class members from petitioning their home state for relief. Indeed, the Full Faith and Credit provision of the United States Constitution would compel state courts to enforce a sister state's judgment.

The trial court faces difficult questions of choice of law which, in a nationwide class action, could be a Sisyphean task. In *Phillips Petroleum*, the Court held that it was arbitrary, unfair and a violation of due process for a Kansas court to apply Kansas law to all members of a nationwide class action where many class members had little or no relationship to the forum state. "Kansas must have a 'significant contact or significant aggregation of contacts' to the claims asserted by *each member of the plaintiff class*, contacts 'creating state interest,' in order to ensure that the choice of Kansas law is not arbitrary or unfair." *Id.* at 821 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)) (emphasis added). As Kansas lacked sufficient "interest" in claims relating to class residents of other states, especially where the substantive law of the states differed, the application of Kansas law classwide exceeded constitutional limits. *Phillips Petroleum*, 472 U.S. at 821-822.

As in *Phillips Petroleum*, the substantive laws of all fifty (50) states are potentially involved here. The Plaintiffs have alleged claims under the Illinois Consumer Fraud Act *and* "similar 'Little F.T.C. Acts' enacted in every other state," (Complaint, Count III, A35-36), and the Illinois Appellate Court specifically held that the Illinois Consumer Fraud Act applies to the entire nationwide class. (App. Ct. Op., A10).

The trial court may not rest comfortably in the assumption that only Illinois law shall apply. State law under the Consumer Fraud Act varies significantly among the states.[3] Thus, one would be hard-pressed to claim that Illinois had a compelling interest over citizens of other states, who purchased juice from supermarkets in other states, sufficient to warrant the application of Illinois law alone.

On the other hand, if the courts of a foreign state deny the Illinois court's judgment full faith and credit, the due process rights of *Petitioner* are violated. Without adequate notice and an opportunity for absent plaintiffs to recover, this litigation would be of questionable *res judicata* effect. Courts in other jurisdictions would be hard-pressed to bar their unnotified citizens from suit because Plaintiffs litigated the case in Illinois—especially if there is an adverse judgment there. Thus, the risk of inconsistent results and multiple damage claims is very real, a danger against which due process protects. *See e.g., Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 75 (1961) (defendant denied due process when compelled to relinquish property without assurance it would not be held liable in later suit brought by one not bound by first judgment).

Since fluid recovery ignores due process, Petitioner could find itself defending multiple and non-binding class action lawsuits across the nation. Whether another state gives full faith and credit to a decision by the Circuit Court of Cook County, Illinois in this case or not, fluid class recovery is manifestly unfair and violates established principles of due process of law. Such a result would burden Petitioner as well as the courts.

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[3] For example, Iowa has no consumer protection act; Georgia prohibits class actions under its consumer protection act; Arkansas does not provide for private remedies under its consumer protection act; and New York authorizes treble damages. (A47-55).

IV.

THE COURT SHOULD GRANT REVIEW BECAUSE THE ILLINOIS APPELLATE COURT'S APPLICATION OF FLUID RECOVERY VIOLATES PETITIONER'S DUE PROCESS RIGHTS BY PUNISHING PETITIONER AS A CRIMINAL WITHOUT THE NECESSARY CONSTITUTIONAL PROCEDURAL SAFEGUARDS

It is imperative that this Court grant review of the Illinois Appellate Court's decision because the use of fluid recovery impermissibly transforms this civil action into a criminal proceeding by imposing what amounts to criminal sanctions upon Petitioner without providing corresponding criminal procedural safeguards. Such a transformation is a clear violation of Petitioner's due process rights and thus, a violation of the United States Constitution.[4]

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[4] While this Court has held that the award of punitive damages does not violate the due process clause of the Fourteenth Amendment, *Pacific Mutual Life Insurance v. Haslip*, ___ U.S. ___, 111 S.Ct. 1032 (1991), the effect of fluid recovery on Petitioner's due process rights differs substantially from the effect of punitive damages. Traditionally, punitive damages cannot be awarded absent a finding of actual damages. *Jones v. Reagan*, 696 F.2d 551, 554 (7th Cir. 1983). Thus, punitive damages are specifically tied to, and follow, the finding of actual damages. Fluid recovery, on the other hand, awards punitive-like damages *before* any actual damages have been proven. The fluid recovery damages in no way correspond to the actual damages. In fact, in contrast to punitive damages, fluid recovery awards damages even if *no* injury is proven.

Likewise, the Court's holding that punitive damages do not violate the excessive fines clause of the Eighth Amendment, *Browning Ferris Industries v. Kelco*, 492 U.S. 257 (1989), is equally inapplicable to fluid recovery. The *Browning Ferris* Court refused to extend the excessive fines clause to punitive damages in private civil cases because it found punitive damages to be too far from the concerns of the Eighth Amendment. *Id.* at 275. However, unlike punitive damages, punishment is not merely the side effect, but ultimate goal of fluid recovery. The class action attorney, in essence, becomes a private prosecutor-for-hire to deter and punish conduct, without tailoring the remedy to proven damages.

The calculation of damages under fluid recovery completely disregards all civil procedural and remedial mechanisms, and instead focuses on traditionally accepted penal goals such as punishment, disgorgement, and deterrence. *See* LaFave & Scott, *Criminal Law*, pp. 22-24 (punishment and deterrence are typical goals of criminal law). Under the guise of remedying manageability problems of class actions, fluid recovery impermissibly relieves the class of the burden of proving individual injury or damage, and hence, effectively assesses criminal sanctions against Petitioner without any criminal procedural safeguards. Fluid recovery thus unconstitutionally deprives Petitioner of its due process rights under the Fourteenth Amendment.

The mechanism of fluid class recovery is inherently criminal-like. It assesses injury to a large unidentifiable group—tantamount to the general public—and punishes the alleged offenders by requiring them to pay damages not only to parties that can prove their injury, but also to parties who allege but cannot prove an injury, and to others still who never even allege an injury. The system unavoidably results in windfalls to non-class members and deprivations to some absent class members. *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1010-11 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974).

In effect, fluid recovery acts to protect society in general by penalizing an alleged offender to the benefit of large sections of society, whether harmed or not. This is nothing less than criminal law at work. The aim of criminal law is to protect the public against harm by punishing harmful results of conduct, or at least situations which are likely to result in harm if allowed to proceed. LaFave & Scott, *supra*, at 11. In contrast, the function of tort law, the area of law in which class actions (and, correspondingly, fluid recovery) should fall, is to *compensate* someone for the harm *he has already suffered. Id.*

The predominant effect is that criminal sanctions are imposed, while criminal procedural safeguards are bypassed. This, in and of itself, is a violation of Petitioner's due process rights. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (where sanctions in a civil proceeding are essentially criminal, the safeguards of criminal proceedings must be employed to preserve due process rights). In determining that the sanction at issue was a punishment, and, hence, constitutionally required procedural safeguards incident to a criminal prosecution, the *Mendoza-Martinez* Court looked at (1) the congressional intent in passing the act and (2) the "tests traditionally applied" to determine whether an action was penal in nature. *Id.* at 167-68. The traditional tests the Court examined included:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Id. at 168-69.

Several of the "traditional tests" of punishment analyzed and present in *Mendoza-Martinez* are evident in the Illinois Appellate Court's application of fluid recovery. First, fluid recovery was intended to promote traditional aims of punishment. The appellate court specifically authorized its use to implement "policies of deterrence, disgorgement and compensation" (App. Ct. Op., A15). Also, the behavior to which fluid recovery applies is already a crime. Adulteration of food products is monitored by the Food & Drug Administration and specifically prohibited and criminal-

ized under the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 331 (1988). In fact, the former owners of Bodine's Inc., Edward Boden, Sr. and Edward Boden, Jr. have already been criminally convicted and punished for the adulteration of orange juice.

More importantly, the most influential reason behind the *Mendoza-Martinez* Court's decision, *intent* that the sanction be a punishment, is equally present in the Illinois Appellate Court's application of fluid recovery. The *Mendoza-Martinez* Court found that the primary function of the statute was to serve as an additional penalty for a special category of draft evaders. *Id.* at 169-70. Analogously, it is clear that in adopting the use of fluid recovery, the court below intended to fashion a punishment. The court's primary purpose was to provide an additional penalty by allowing damages, without proof of individual injuries, against defendants who transact with large unidentifiable groups. Thus, fluid recovery unconstitutionally imposes a criminal sanction in civil proceedings. The Illinois court's concern for consumers, while admirable, is not sufficient to overcome the urgency to preserve due process rights.

As the court below chose to apply fluid class recovery, then it must also apply corresponding criminal procedural safeguards. Punishment cannot be constitutionally imposed otherwise. Consequently, Petitioner has a right to a higher standard of proof, a right to confrontation of witnesses, and a right to protection from double jeopardy. U.S. Const. amend. V. The court has failed to provide these protections and Petitioner's due process rights thus have been violated.

V.

IMPOSITION OF FLUID RECOVERY BY THE ILLINOIS APPELLATE COURT SUBSTANTIALLY ALTERS THE SUBSTANCE OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT IN VIOLATION OF THE SUPREMACY CLAUSE

The application of fluid recovery below is inconsistent with the explicit statutory language of the RICO statute, 18 U.S.C. § 1964, alleged in the Complaint. The RICO statute is designed solely to provide a civil mechanism to allow injured victims to obtain compensation. By its terms, civil RICO requires individual proof of damages:

> *Any person injured* in his business or property by reason of a violation of [RICO] may sue therefor—and shall recover threefold *the damages he sustains* and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c) (1988) (emphasis added). The civil RICO statute is by design *remedial* in nature. The mere finding of violation without *proof of injury* cannot create liability.

When first enacting the civil RICO statute, the Senate Judiciary Committee emphasized that the statute was remedial—it was designed to compensate the *injured*:

> [I]t must be emphasized that these remedies are not exclusive, in that title IX [civil RICO] seeks essentially an economic, not a punitive goal. However remedies may be fashioned, it is necessary to free the channels of commerce from predatory activities, but there is no intent to visit punishment on any individual; the purpose is civil . . . [T]itle IX, it must again be emphasized, is remedial rather than penal.

Senate Report of the Committee on the Judiciary, Sen. Rep. No. 617, 91st Cong., 1st Sess. 81-82 (1969).

The Judiciary Committee further compared the civil remedial purpose of RICO to that of the antitrust laws:

> What is ultimately at stake is not only the security of individuals and their property, but also the viability of our free enterprise system itself. The committee feels, therefore, that much can be accomplished here by adapting the civil remedies developed in the antitrust field to the problem of organized crime.

Id., p. 80-81.

Yet fluid recovery, instead of compensating those who have been injured in the past, punishes defendants by forcing them to provide a windfall to those who have never been harmed. Thus, what purports to be no more than a state procedural device, in fact significantly changes federal substantive rights in abrogation of the Supremacy Clause of the United States Constitution, art. VI, cl. 2.

This Court has steadfastly guarded the legislative province of Congress from encroachment by the judiciary. For instance, where Congress enacts legislation that provides no private remedy, federal courts may not create such a remedy, thereby enlarging their jurisdiction. *California v. Sierra Club*, 451 U.S. 287 (1981). In *Sierra Club*, this Court held that legislative silence in the Rivers and Harbors Appropriation Act, 33 U.S.C. § 403, banning the creation of any obstructions in navigable waters not authorized by Congress, did not provide a private right of action:

> The federal judiciary will not engraft a remedy on a statute, no matter how salutory, that Congress did not intend to provide.

Id. at 297. A contrary result—one that would allow the federal judiciary to imply a private right of action when Congress fails to express such an intent—risks inconsistent and incorrect determinations of legislative intent,

judicial power, and the federal system. As stated in *Thompson v. Thompson*, 484 U.S. 174, 188 (1988) (Scalia, J., concurring), "[It is] dangerous to assume that, even with the utmost self-discipline, judges can prevent the implications they see from mirroring the policies they favor."

The fact that fluid recovery arguably may be labeled as a procedural device does not shield it from constitutional challenge. As this Court noted in *Felder v. Casey*, 487 U.S. 131 (1988) the "federal right cannot be defeated by the form of local practice." *Id.* at 138, citing *Brown v. Western R. Co. of Alabama*, 339 U.S. 294 (1949). In *Felder*, the Court struck down as unconstitutional a Wisconsin statute requiring 120 days notice to state agencies and officers prior to filing suit against them for violation of the federal civil rights laws. Although the Wisconsin statute was "procedural," it nonetheless acted as "a substantive condition on the right to sue governmental officials and agencies. . . ." *Id.*, at 152. "Principles of federalism, as well as the Supremacy Clause, dictate that such a state law must give way to vindication of the federal right when that right is asserted in state court." *Id.* at 153.

The federal judiciary may not supplement federal statutes with remedies that Congress did not expressly intend; *a fortiori*, neither may an Illinois state court. However, that is precisely what has happened below. The dangers of which this Court forewarned in *Sierra Club*, *Thompson*, and *Felder* would be repeated or exacerbated should state courts, through a facile determination of legislative intent, succeed in implying federal statutory remedies that Congress did not specifically intend. "[O]nly if the federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes." *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 361 (1952).

The Illinois Court of Appeals rationalized its application of fluid recovery through *dicta* in *Simer v. Rios*, 661 F.2d 655 (7th Cir. 1981), *cert. denied*, 456 U.S. 917 (1982), which held that the policies of fluid recovery—deterrence, disgorgement, and compensation—must be consistent with the policies reflected by the statute violated.[5]

The application of fluid recovery here however, unconstitutionally amends the express language of the RICO statute, and hence thwarts Congressional intent. Every statute that contemplates the award of money damages can be said to reflect policies of punishing the wrongdoer and compensating the injured. However, this superficial determination of legislative intent does not justify disregard of explicit statutory language. Insofar as fluid recovery dispenses with individual proof of injury, it is inconsistent with the explicit language of the federal civil RICO statute.

It is well established that under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, state law is nullified to the extent it conflicts with federal law. *Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982).

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[5] The Illinois Appellate Court specifically held that "fluid recovery is available in *at least* the claim brought under the Consumer Fraud Act," suggesting that fluid recovery will be applied to the other asserted claims. (App. Ct. Op., A15) (emphasis added). The practical outcome of the Illinois Appellate Court's holding, however, is that fluid recovery has certified the class to pursue all allegations in the complaint. Dissolving the class and maintaining numerous individual actions under the RICO claim while maintaining a single class action under state law claims would present a convoluted and wholly unnecessary procedure. The effect of the court's decision, therefore, is that the preemption issues still remain under RICO. The Illinois Appellate Court failed to specify that its decision regarding the constitutionality of fluid recovery was limited to the one state statutory claim *alone*. The Illinois Appellate Court should not be permitted to insulate itself from review through imprecision. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

Preemption of state law "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). The fact that the state regulation may reflect important state policies does not prevent federal preemption. *Free v. Bland*, 369 U.S. 663, 666 (1962); *Ridgway v. Ridgway*, 454 U.S. 46, 54-55 (1981).

Therefore, the importance in Illinois of general policies of deterrence, disgorgement, and compensation—at least as those policies are implemented in a fluid class recovery—are of no avail when in conflict with the language of federal law. Although Congress equally sought to advance the interest of compensation, it did so in the RICO statute only by first requiring individual proof of harm. As fluid recovery dispenses with such proof, Illinois must yield to Congressional design, and refuse to apply fluid recovery in this action. The Supremacy Clause of the U.S. Constitution requires no less.

Numerous federal courts have found fluid recovery to be inconsistent with the civil remedy provisions of federal antitrust law—the very law which Congress drew upon when enacting civil RICO. *See* Senate Report of the Committee on the Judiciary, *supra*; *Windham v. American Brands*, 565 F.2d 59, 65 (4th Cir. 1977). (" 'The language that Congress used in this statute . . . leaves no room for awarding damages to some amorphous 'fluid class' rather than, or in addition, to one or more actually injured persons.' " quoting Handler, *Twenty-fourth Annual Antitrust Review*, 72 Col. L. Rev. 1, 37 (1972)); *In re Hotel Telephone Charges*, 500 F.2d 86, 92 (9th Cir. 1974) ("[T]he Congressional scheme does not contemplate that private attorneys are to act as prosecutors to force antitrust violators to disgorge their illegal profits in the general interest of society at large." [citation omitted]).

Considerations of disgorging ill-gotten gains, punishing wrongdoers, and deterring illegal conduct are presumed by the judiciary in every case involving economic damages. But these considerations do not justify the disregard of specific statutory language requiring proof of injury. As stated in *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 130 (9th Cir. 1973), *cert. denied sub nom. Morgan v. Automobile Mfrs. Assoc.*, 414 U.S. 1045 (1973):

> Insofar as the common weal was injured the federal government was the proper party to seek redress. . . . If the Government did not prosecute its actions with sufficient vigor, the remedy lies in executive or legislative reform, not in judicial overreaching.

If the current federal law does not adequately protect the public, Congress, not the state judiciary, should act to reform the law. The state judiciary may not amend what Congress enacted because of its view of public policy.[6] A contrary result would run afoul of the Federal Supremacy Clause.

VI.

THE U.S. SUPREME COURT MAY PROPERLY EXERCISE ITS JURISDICTION OVER THIS CASE UNDER 28 U.S.C. § 1257

Congress has granted this Court the authority to review final judgments or decrees of the highest state court in

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[6] Congress has considered amending the Federal Trade Practices Act, upon which the Consumer Fraud Act is based, to address the very problem of large consumer class actions which the trial and Appellate Court attempted to resolve through fluid recovery. Yet, these amendments have all died in the Senate Commerce Committee. *See e.g.*, 4 C.A.R. 3, 11-16, 4 C.A.R. 181, 187-194, and 4 C.A.R. 342-346 (1975).

which a judgment could be had. 28 U.S.C. § 1257(a) (1988).[7] This Court has consistently given the finality requirement a "practical," rather than a technical construction. *Construction & General Laborers' Union v. Curry*, 371 U.S. 542 (1963). As the cases have unfolded, the Supreme Court has entertained jurisdiction in instances where the highest state court has finally determined the federal issue, even though further proceedings are pending in lower state courts.

This Court has adopted such a flexible approach, because it recognizes that an unyielding application of the finality requirement would unnecessarily require parties to await complete resolution of the proceedings below, even as to collateral matters. *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 477 (1975). This Court in *Cox* identified four categories of cases in which it could exercise its appellate jurisdiction, despite the pendency of further proceedings in the state courts. In the fourth category of cases—the category in which the present petition falls—the Court identified the following criteria: (1) The state courts must have finally resolved the federal issue, despite the pendency of further state court proceedings; (2) the possibility exists that the party seeking review will prevail on nonfederal grounds in those further proceedings,

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[7] "§ 1257. State courts; appeal; certiorari. (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. (b) For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals."

thereby mooting the federal issue; (3) reversal on the federal issue by this Court would terminate the litigation; and (4) failure to review immediately would seriously erode federal policy. *Cox*, 429 U.S. at 482-83. Since its decision in *Cox*, this Court has continually expressed its willingness to review cases which, while lacking technical finality, fall within the parameters of this category. *See e.g., Southland v. Keating*, 465 U.S. 1 (1984); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). Like those decisions, the instant case meets all of the specified criteria, and therefore fits squarely within *Cox's* fourth category.

A. The Decisions of the Illinois Supreme Court and the Illinois Appellate Court Declaring Fluid Recovery to Be Constitutional Finally Resolve That Federal Issue.

In the present case, the federal issue—the constitutionality of fluid recovery—has already been finally decided in the state courts. The Illinois Appellate Court specifically held fluid recovery to be a constitutional means to avoid class manageability problems. (App. Ct. Op., A13). Petitioner filed a petition for appeal to the Illinois Supreme Court. That court denied the petition, thereby finally determining, for all practical purposes, the constitutionality of fluid recovery in Illinois.

Under Illinois law, a party may petition the Illinois Supreme Court for review either as a matter of right or request leave to appeal. Ill. Rev. Stat. ch. 110A, ¶¶ 315, 317. (A42-44). A petition for appeal as a matter of right must raise a question under the Constitution of the United States or of Illinois, and the Illinois Supreme Court's jurisdiction is non-discretionary. Ill. Rev. Stat. ch. 110A, ¶ 317. However, jurisdiction over a petition for leave to appeal is a matter of the Illinois Supreme Court's discretion. Ill. Rev. Stat. ch. 110A, ¶ 315. Illinois Supreme Court Rule 317 specifically authorizes appeals in the alternative.

Under this process, Petitioner sought review both as a matter of right on the federal and state constitutional issues, and alternatively, for leave to appeal. Because the appeal was sought in part as a matter of right, the Illinois Supreme Court did not have discretion to decline review. Its refusal to hear the case may be viewed, then, as an affirmation of the appellate court's ruling on the constitutionality of fluid recovery. Therefore, not only has Petitioner exhausted the appeals process in Illinois, but Illinois' highest court has finally determined the federal issue.[8]

B. Petitioner May Prevail on Nonfederal Grounds, Thereby Mooting the Federal Issue.

If proceedings in the present case were to continue in state court, there exists the very real possibility that petitioner could prevail on nonfederal grounds. For example, petitioner could prevail with a finding of non-liability at trial.

This case is, then, identical to *Cox* itself, as well as to the post-*Cox* line of cases in this Court. In all of those decisions this Court, in exercising review, emphasized the danger that the state court's interpretation of federal law could be insulated from later review in the Supreme Court by state court resolution in favor of the petitioner on nonfederal grounds.

[8] It is by no means a prerequisite to the Supreme Court's jurisdiction that the highest state court have rendered an opinion. In *Citizens & So. National Bank v. Bougas*, 434 U.S. 35 (1977), the state appellate court granted an interlocutory appeal, but the state supreme court denied certiorari. Nonetheless, the Court exercised its jurisdiction under 28 U.S.C. § 1257, in effect hearing an interlocutory appeal from the state appellate court.

C. Reversal of the Decision of the Illinois Appellate Court on Fluid Recovery Would End This Litigation.

The third element of the *Cox* test, that reversal of the state court's finding would end this litigation, also applies in the instant case. The class action here was found manageable and therefore certified only on the assumption that fluid recovery would be available. Otherwise, the proof and award of damages would be impractical and the class unmanageable. This class action would therefore effectively end if the state court decision on the constitutionality of fluid class recovery were reversed.

D. The Failure to Review the Decision of the Illinois Appellate Court Would Seriously Erode Federal Policy.

Finally, the refusal immediately to review the Illinois courts' resolution of the federal issues would seriously erode federal policy. The constitutional principles implicated by this case are fourfold: first, fluid recovery violates the due process rights of both Petitioner and the absent members of the plaintiff class; second, it disrupts the orderly administration of law in other states by attempting to bind class members, who have no contacts with Illinois, to an Illinois adjudication, in violation of this Court's holding in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); third, it violates due process by effectively transforming a civil case for compensation into a criminal prosecution to punish and deter, without the concomitant constitutional protections; and fourth, it contradicts the federal RICO statute by relieving Respondents of the obligation of proving damages. In light of the seriousness of the constitutional flaws of the ruling of the appellate court below, that ruling should not be permitted to stand.

CONCLUSION

The decision of the Illinois Appellate Court is the first Illinois case expressly to uphold and allow use of fluid recovery against constitutional challenge. Unless this Court exercises review at this point, there is a serious danger that the state court's decision will stand as a precedent for future litigation, without any opportunity for this Court to correct the state courts' misinterpretation of federal constitutional and statutory law.

Respectfully submitted,

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APPENDIX

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Fourth Division
December 26, 1991

Nos. 1-90-3609/
1-90-3610

PAT GORDON, CATHERINE THOMAS, SAM GORDON, and MICHELLE CHROMAN, on behalf of herself as next friend for her minor children, ADAM CHROMAN and MELISSA CHROMAN, individually and on behalf of all others similarly situated,	) APPEAL FROM THE) CIRCUIT COURT OF) COOK COUNTY.
Plaintiffs-Appellees,	)
v.	)
EDWARD BODEN, SR., BODINE'S, INC., EDWARD BODEN, JR., ROGER J. WALSH, JR., DOMINICK'S FINER FOODS, INC., CERTIFIED GROCERS WAREHOUSE, INC., and TREASURE ISLAND FOODS, INC., individually and as representatives of a class; and THE KROGER CO.,	)
Defendants,	)
and	)
EDWARD BODEN, SR., BODINE'S, INC., and EDWARD BODEN, JR.,	) HONORABLE) ROBERT L.) SKLODOWSKI
Defendants-Appellants.	) JUDGE PRESIDING.

JUSTICE LINN delivered the opinion of the court:

Plaintiffs, Pat Gordon, Sam Gordon, Catherine Thomas, and other named plaintiffs brought a class action in the Circuit Court of Cook County. Plaintiffs represent a nationwide class of consumers who bought adulterated orange juice products that were processed by defendant Bodine's, Inc. Bodine's corporate officers were defendants Edward Boden, Sr., and Edward Boden, Jr.

The trial court granted plaintiffs' motion for class certification. The court also certified a question for review that pertains to the assessment and distribution of damages among class members.

We affirm the order of the trial court in all respects.

Background

The record shows that in July 1989 the Bodens and Roger Walsh, Jr., were charged in a multi-count Federal indictment with selling adulterated food. As part of a plea agreement, they pled guilty to some of the charges. On February 27, 1990, the United States District Court for the Northern District of Illinois sentenced each of the Bodens to a prison term, a fine, and community service. (Walsh was sentenced the preceding week.)

On the day that the Bodens were sentenced in Federal court, plaintiffs filed their third amended complaint in Cook County Circuit Court. The pleading alleged as follows. Until 1985, Bodine's, Inc. (now known as McCain's OJ), was the largest processor of frozen orange juice in the Midwest. Bodine's corporate officers were the Bodens and Walsh. Defendants processed orange juice products, i.e., 100% orange juice, orange juice from concentrate, and frozen orange juice.

Between 1978 and 1985, defendants adulterated these orange juice products "with up to 40% beet sugar, corn sugar, monosodium glutamate, and other low-cost inferior ingredients." Despite the adulteration, defendants knowingly affixed false labels to its product containers, representing that the products were processed from 100% orange juice. The complaint also named as defendants several retail grocery chains that bought the adulterated orange juice products from Bodine's and resold them to consumers. Plaintiffs also alleged that defendants intentionally concealed the adulteration from consumers.

Based on the foregoing acts, plaintiffs' six-count complaint sought damages under the following theories: breach of express warranty and implied warranty of merchantability (see Ill. Rev. Stat. 1989, ch. 26, pars. 2-313, 2-314), statutory fraud (see Ill. Rev. Stat. 1989, ch. 121-1/2, par. 261 *et seq.*), common law fraud, and violation of the Federal Racketeer Influenced and Corrupt-Organizations Act (RICO) (see 18 U.S.C. § 1961 *et seq.*).

On December 7, 1990, the trial court entered an order pertaining to several matters in the litigation. The court dismissed from the action the retail grocery chains. The court certified the following class:

> All persons in the United States who purchased at retail adulterated orange juice products manufactured or sold by Bodine's, Inc., other than the defendants. The defendants remaining in the case are Edward Boden, Sr., Edward Boden, Jr., and Bodine's, Inc.

The trial court also certified the following question for review:

> whether what is commonly known as "fluid recovery" (various mechanisms involving the assessment of damages to the class as a whole followed by its distribution in the manner most likely to result in benefit

to the injured population) is permissible in a class action in Illinois.

The court found that the use of fluid recovery would substantially facilitate and expedite the litigation. The court also found that "the recoveries of hundreds of thousands or millions of class members" would likely be defeated if the procedure were not permissible. We granted leave to appeal. See 134 Ill. 2d R. 308.

Opinion

I

The parties initially disagree as to the court's scope of review. Plaintiffs contend that we must restrict our review solely to the precise question certified by the trial court. Defendants, however, contend that we may review the trial court's order granting class certification. It is true that a reviewing court generally should limit an interlocutory appeal under Supreme Court Rule 308 (134 Ill. 2d R. 308) to the question certified by the trial court. (*People v. Pollution Control Board* (1984), 129 Ill. App. 3d 958, 965, 473 N.E.2d 452, 456-57). However, it is settled that a trial court may use Rule 308 as a means of reviewing an order granting class certification at an early stage of the litigation. *Frank v. Teachers Insurance & Annuity Association of America* (1978), 71 Ill. 2d 583, 590-91, 376 N.E.2d 1377, 1379-80.

In the case at bar, we conclude that the certified question, which pertains to the assessment and distribution of damages among class members in general, necessarily includes the question of the propriety of the class certification in the present case. We cannot neatly compartmentalize and independently resolve one issue and not the other. (See *Frank*, 71 Ill. 2d at 592, 376 N.E.2d at 1380). Therefore, we will answer the certified question in the course of reviewing the class certification.

II

Section 2-801 of the Code of Civil Procedure (Ill. Rev. Stat. 1989, ch. 110, par. 2-801), formerly section 57.2 of the Civil Practice Act (Ill. Rev. Stat. 1977, ch. 110, par. 57.2), governs class actions in Illinois. For an action to be maintained as a class action, a trial court must find four prerequisites: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of fact or law common to the class which predominate over any questions affecting only individual members; (3) the representative parties will fairly and adequately protect the interest of the class; and (4) the class action is an appropriate method for the fair and efficient adjudication of the controversy. Ill. Rev. Stat. 1989, ch. 110, par. 2-801.

The class action statute essentially codifies Illinois case law. (*Hoover v. May Department Stores Co.* (1978), 62 Ill. App. 3d 106, 114, 378 N.E.2d 762, 769, *rev'd on other grounds* (1979), 77 Ill. 2d 93, 395 N.E.2d 541; K. Forde, *Illinois's New Class Action Statute*, 59 Chi. Bar Rec. 120, 135 (1977).) Thus, a court may seek guidance in pertinent cases decided prior to the statute's enactment. (*Eshaghi v. Hanley-Dawson Cadillac Co.* (1991), 214 Ill. App. 3d 995, 999-1000, 574 N.E.2d 760, 763.) However, it must be remembered that "[w]ith the advent of the statute many of the prior decisions have become corpses." *Steinberg v. Chicago Medical School* (1977), 69 Ill. 2d 320, 338, 371 N.E.2d 634, 643.

In deciding whether to certify a class, a court may consider "any matters of fact or law properly presented by the record, including the pleadings, depositions, affidavits, answers to interrogatories and any evidence that may have been adduced at the hearings." (*Charles Hester Enterprises, Inc. v. Illinois Founders Insurance Co.* (1985),

137 Ill. App. 3d 84, 100, 484 N.E.2d 349, 360-61, *aff'd.* (1986), 114 Ill. 2d 278, 499 N.E.2d 1319.) Certification of a class is within the sound discretion of the trial court and will be disturbed only if there is an abuse of that discretion or if impermissible legal criteria are applied. *Purcell & Wardrope Chartered v. Hertz Corp.* (1988), 175 Ill. App. 3d 1069, 1074, 530 N.E.2d 994, 997.

Turning to the first prerequisite of section 2-801, defendants do not dispute that the class is so numerous that joinder of all members is impracticable. The trial court found that class members could potentially total in the "hundreds of thousands or millions." Obviously, any attempt to join such a large number of plaintiffs in a single suit would render the suit unmanageable and, in contrast, multiple separate claims would be an imposition on the litigants and the courts. (*Steinberg*, 69 Ill. 2d at 337, 371 N.E.2d at 642-43; *Hoover*, 62 Ill. App. 3d at 114, 378 N.E.2d at 769.) Further, as one commentator has observed:

> In cases where there is a substantial number of potential claimants and the individual amounts of their claims are relatively small, Illinois courts have tended to permit the claims to proceed as a class action. Forde, 59 Chi. Bar Rec. at 122.

We hold that the first prerequisite of section 2-801 is established.

Turning to the second prerequisite of section 2-801, defendants contend that the record does not establish the existence of predominant questions of fact or law common to the class. Defendants initially assert that a successful adjudication of a class representative's individual claim would not establish a right to recovery in any other class member. Defendants posit that each class member's purchase of an adulterated orange juice product involved

a unique set of facts, such as the exact type of item purchased, the particular retail grocery store where the item was purchased, the date it was purchased, the label the item bore, the purchase price, and each consumer's reliance on defendants' misrepresentations. Thus, defendants reason, each class member would be required to testify to establish a right to recovery, *i.e.*, defendants' liability. Defendants argue, therefore, that a class action cannot be maintained.

We cannot accept defendants' argument. Our supreme court has explained that section 2-801(2) of the class action statute "is couched in the disjunctive—'common questions of fact *or* law.' It does not, therefore, require the presence of both a common question of fact and a common question of law." (*Miner v. Gillette Co.* (1981), 87 Ill. 2d 7, 17, 428 N.E.2d 478, 483.) "So long as there are questions of fact or law common to the class and these predominate over questions affecting only individual members of such class, the statutory requisite is met." *Steinberg*, 69 Ill. 2d at 338, 371 N.E.2d at 643.

We conclude that this test has been met in the case at bar. The record shows the existence of at least one question common to the class that predominates over questions affecting individual class members. That question is simply whether defendant adulterated its orange juice products and committed the other fraudulent acts as alleged. In *Brooks v. Midas-International Corp.* (1977), 47 Ill. App. 3d 266, 361 N.E.2d 815, we held as follows:

> A class action can properly be prosecuted where a defendant is alleged to have acted wrongfully in the same basic manner as to an entire class. In such circumstances, the common class questions still predominate the case, and the class action is not defeated. [Citations.] 47 Ill. App. 3d at 273, 361 N.E.2d at 820.

We further conclude that the other questions that defendants raise, pertaining to the exact circumstances of each class member's purchase, fail to show that the common question does not predominate.

The question of each class member's reliance on defendant's misrepresentation does not show that the common question does not predominate. Plaintiffs alleged, *inter alia*, that defendants violated the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act). (Ill. Rev. Stat. 1989, ch. 121-1/2, par. 261 *et seq.*) In *Brooks*, this court distinguished a class action that sought relief for a statutory fraud violation from a class action seeking relief under a common law fraud theory. We observed as follows:

> Under the common law, reliance was an element which had to be alleged in order to constitute a valid cause of action for misrepresentation or deceit. [Citations.] However, the language employed in the Consumer Fraud Act clearly indicates that it is the intent of the defendant in his conduct, not the reliance or belief of the plaintiff, which is the pivotal point upon which an action arises. [Citation.] Section 2 of the Act specifically provides that the question of whether a person has been misled, deceived or damaged is not an element of an action brought under the Act. If, after trial, it is found that defendant did engage in an unlawful practice in its advertising [footnote omitted], then the question common to all class members has been established in favor of plaintiffs. *Brooks*, 47 Ill. App. 3d at 272-73, 361 N.E.2d at 819-20.

Also, defendants contend that the common question does not predominate because each consumer paid a different price for a particular item. However, it is settled that "[t]he fact that the class members' claims for refunds may be in varying amounts which must be determined sepa-

rately does not necessarily mean that the common question does not predominate." *Society of St. Francis v. Dulman* (1981), 98 Ill. App. 3d 16, 18, 424 N.E.2d 59, 61, citing *Saldana v. American Mutual Corp.* (1981), 97 Ill. App. 3d 334, 422 N.E.2d 860.

Additionally, defendants posit that the trial court would have to apply to each purchase the substantive law of the state in which each class member bought the adulterated orange juice product. Defendants contend, therefore, that the common question is governed by the substantive law of possibly 50 states and does not predominate.

We disagree. The question of whether laws of different states apply to specific transactions alleged in a class action will not ordinarily prevent certification of the class. (*Purcell*, 175 Ill. App. 3d at 1075, 530 N.E.2d at 998). We initially note that if the trial court found that Illinois has significant contact to the claims asserted by each class member, the court could apply Illinois substantive law to this multi-state class action. This finding would ensure that the application of Illinois law is neither arbitrary nor unfair. (*Martin v. Heinold Communities, Inc.* (1987), 117 Ill. 2d 67, 82, 510 N.E.2d 840, 846-47 (and cases cited therein).) We further note that the trial court could simply divide the class into subclasses. (*Martin*, 117 Ill. 2d at 81-82, 510 N.E.2d at 846; *Miner*, 87 Ill. 2d at 17-18, 428 N.E.2d at 483-84.) "Moreover, if at some later time in the litigation the subclassification becomes unmanageable, the court, of course, always has the option to set aside the class certification or a portion of it." (*Purcell*, 175 Ill. App. 3d at 1075, 530 N.E.2d at 998.) At the most, this question constitutes a hypothetical problem that might arise in the future. As such, it is not a sufficient basis to refuse to certify an otherwise properly pleaded class action. See *Purcell*, 175 Ill. App. 3d at 1075, 530 N.E.2d at 998.

In their complaint and in their motion for class certification, plaintiffs list many questions which they claim are predominant and common to the class. We need not address each question *seriatim*. It suffices to say that plaintiffs' claim under the Consumer Fraud Act predominates and is common to the class. We note that the class action device "is flexible in nature and may be adjusted or modified by the trial court at a later point in the litigation to accommodate any changes or newly discovered facts as they arise." (*Purcell*, 175 Ill. App. 3d at 1076 n.2, 530 N.E.2d at 999 n.2.) Indeed, even a subsequent "determination that some members of a class are not entitled to relief because of some particular factor will not bar the classification." *Steinberg*, 69 Ill. 2d at 338, 371 N.E.2d at 643.

We also note that defendants cite *Reardon v. Ford Motor Co.* (1972), 7 Ill. App. 3d 338, 287 N.E.2d 519, in support of their argument. In *Steinberg*, our supreme court explained that the decision in *Reardon* rested at least in part on a common law requirement for class actions that was superseded by the class action statute. The *Steinberg* court questioned the precedential value of *Reardon* (69 Ill. 2d at 339-40, 371 N.E.2d at 644) and we do likewise. We hold that the second prerequisite of section 2-801 is established.

Turning to the third prerequisite of section 2-801, defendants claim that the named plaintiffs will not adequately represent the class. The purpose of the adequate representation requirement is merely to ensure that all class members will receive proper, efficient, and appropriate protection of their interests in the presentation of the claim. *Purcell*, 175 Ill. App. 3d at 1078, 530 N.E.2d at 1000; *Brooks*, 47 Ill. App. 3d at 274, 361 N.E.2d at 820.

In the case at bar, the interests of the named plaintiffs are the same as those of the absentee class members—to seek damages based on defendants' misrepresentations to consumers concerning their adulterated orange juice products. Further, the record shows that this is not a collusive action; rather, this is an adversary proceeding against defendants. If the adequacy of representation by the named plaintiffs is questioned at a later time, we repeat that the trial court could, if necessary, modify the class structure or decertify the class. (*Purcell*, 175 Ill. App. 3d at 1078-79, 530 N.E.2d at 1001.) We hold that the third prerequisite of section 2-801 is established.

Turning to the fourth prerequisite of section 2-801, defendants claim that a class action is not an appropriate method for the fair and efficient adjudication of the controversy. In applying this prerequisite in a particular case, a court considers whether a class action: (1) can best secure the economies of time, effort and expense, and promote uniformity; or (2) accomplish the other ends of equity and justice that class actions seek to obtain. (Forde, 59 Chi. Bar Rec. at 128; see *Society of St. Francis*, 98 Ill. App. 3d at 19, 424 N.E.2d at 61-62.) Further, "[a] controlling factor in many cases is that the class action is the only practical means for class members to receive redress—particularly where the claims are small." Forde, 59 Chi. Bar Rec. at 128.

Applying these principles to the record before us, we conclude that a class action is appropriate in the case at bar. Initially, our holding that the first three prerequisites of section 2-801 are established makes it evident that the fourth requirement is fulfilled. (See *Steinberg*, 69 Ill. 2d at 339, 371 N.E.2d at 644.) Additionally, it must be remembered that this is a consumer class action. Our courts have recognized that, "[i]n a large and impersonal society,

class actions are often the last barricade of consumer protection." (*Eshaghi*, 214 Ill. App. 3d at 1004, 574 N.E.2d at 766.) The consumer class action is an inviting procedural device to address frauds that cause small damages to large groups. When brought by plaintiffs who have no other avenue of legal redress, the consumer class action provides restitution to the injured and deterrence to the wrongdoer. (*Hoover*, 62 Ill. App. 3d at 112, 378 N.E.2d at 768; see K. Ross, *Multistate Consumer Class Actions in Illinois*, 57 Chi.-Kent L. Rev. 397, 398 (1981).) Thus the ends of equity and justice are attained.

Defendants vigorously argue that a class action is not appropriate in the case at bar because the class is composed of a large number of unidentified individuals whose claims cannot be substantiated. Defendants cite cases in which courts have held that "insubstantial recoveries by class members, high administrative costs in relation to aggregate recovery and difficulty in corroborating claims are valid considerations in determining whether a class action is manageable." *Hayna v. Arby's Inc.* (1981), 99 Ill. App. 3d 700, 712, 425 N.E.2d 1174, 1184, citing *Adams v. Jewel Companies, Inc.* (1976), 63 Ill. 2d 336, 348 N.E.2d 161.

However, in the trial court's order granting class certification, the court approved the use of fluid recovery to avoid the expected manageability problems. The term "fluid recovery" refers to a procedural device used to avoid manageability problems in the calculation and distribution of damages in large class actions. Examples of such problems are where the persons injured are not likely to come forward and prove their claims, or where such persons cannot be given notice of the case. (*Simer v. Rios* (7th Cir. 1981), 661 F.2d 655, 675.) The mechanism generally consists of the following format:

> (1) the amount of damages incurred by the class as a whole is determined in a single adjudication, creating a damage fund; (2) individual member claimants capable of proving valid claims obtain their share of the fund; and (3) the unclaimed portion of the fund is applied to the class's benefit. [Citation.] (*Cicelski v. Sears, Roebuck & Co.* (1984), 132 Mich. App. 298, 304-05, 348 N.W.2d 685, 689.)

The third procedural step is the actual fluid recovery, which commonly assumes one of two forms. The remainder of the fund is: (1) distributed through the market, usually in the form of reduced charges, or (2) used to fund a project which will likely benefit class members. *Simer*, 661 F.2d at 675; *Cicelski*, 132 Mich. App. at 305, 348 N.W.2d at 689; see generally Note, *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1516-23 (1976).

Defendants argue that the fluid recovery mechanism violates the class action statute. Thus, according to defendants, the trial court's approval of the use of fluid recovery amounted to a *de facto* amendment of the statute. This brings us to the specific question certified by the trial court. We answer the question in the affirmative, and conclude that the fluid recovery mechanism is permissible in Illinois in appropriate cases.

Initially, we agree with other courts that the fluid recovery procedure is not inherently unconstitutional. In *Cicelski*, the Michigan Court of Appeals reviewed the several Federal cases that addressed the issue. The court agreed with a commentator that, absent issues that require individualized proofs, a defendant in a class action is not prejudiced by being restricted to only one hearing on common issues. Regarding the calculation of damages, " 'it has never been thought that due process required multiple hearings where there was one full and fair adjudication of the

merits.' " *Cicelski*, 132 Mich. App. at 306-07, 348 N.W.2d at 690, quoting Note, 89 Harv. L. Rev. at 1524-25.

Further, the court in *Cicelski* was persuaded by the approach taken by the United States Court of Appeals for the Seventh Circuit in *Simer*. We are likewise. In *Simer*, the court held as follows:

> We need not adopt either of the two extreme positions—that is, whether a fluid recovery always can be used to surmount problems in the going forward of a class action or whether a fluid recovery is per se unconstitutional. Rather, we believe that a careful case-by-case analysis of use of the fluid recovery mechanism is the better approach. In this approach, we focus on the various substantive policies that use of a fluid recovery would serve in the particular case. The general inquiry is whether the use of such a mechanism is consistent with the policy or policies reflected by the statute violated. This matter can be more particularized into an assessment of to what extent the statute embodies policies of deterrence, disgorgement, and compensation. (Footnotes omitted.) *Simer*, 661 F.2d at 676, quoted in *Cicelski*, 132 Mich. App. at 307, 348 N.W.2d at 690-91.

After reviewing the record before us, we conclude that fluid recovery is appropriate in the case at bar. Plaintiffs allege, *inter alia*, that defendants violated the Consumer Fraud Act. (Ill. Rev. Stat. 1989, ch. 121-1/2, par. 261 *et seq.*). "The Act is a regulatory and remedial enactment intended to curb a variety of fraudulent abuses and to provide a remedy to individuals injured by them." (*Scott v. Association for Childbirth at Home, International* (1981), 88 Ill. 2d 279, 288, 430 N.E.2d 1012, 1017.) Section 11a of the Act provides that "[the] Act be liberally construed to effect the purposes thereof." (Ill. Rev. Stat. 1989, ch. 121-1/2, par. 271a.) It is quite established that "[t]he provision is a clear mandate from the Illinois legis-

lature that our courts utilize the Act to the utmost degree in eradicating all forms of deceptive and unfair business practices and grant appropriate remedies to injured parties." (*People ex rel. Hartigan v. All American Aluminum & Construction Co.* (1988), 171 Ill. App. 3d 27, 33, 524 N.E.2d 1067, 1070, citing *Duhl v. Nash Realty, Inc.* (1981), 102 Ill. App. 3d 483, 495, 429 N.E.2d 1267, 1277; see *Warren v. LeMay* (1986), 142 Ill. App. 3d 550, 563, 491 N.E.2d 464, 471.) This legislative intent and mandate necessarily include policies of deterrence, disgorgement and compensation. Thus, we hold that fluid recovery is available in at least the claim brought under the Consumer Fraud Act.

In sum, the benefits of class certification in the case at bar, with the use of fluid recovery where appropriate, outweigh the tremendous burdens presented if the case proceeded without class certification. We hold that the fourth prerequisite of section 2-801 is established. After reviewing the entire record, we cannot say that the trial court exceeded its discretion in certifying the class.

For the foregoing reasons, the order of the circuit court of Cook County is affirmed.

Affirmed.

JIGANTI, P.J., and JOHNSON, J., concur.

IN THE SUPREME COURT OF ILLINOIS

March 27, 1992

73187—Pat Gordon et al., etc., respondents, v. Edward Boden, Sr., et al., etc. (Bodine's, Inc., petitioner). Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for appeal as a matter of right or leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 20, 1992.

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PAT GORDON, et al.,	)
	)
Plaintiffs,	)
	)
v.	) 89 CH 653
	)
EDWARD BODEN, SR., et al.,	) Judge Sklodowski
	)
Defendants.	)

ORDER

This matter coming before the Court on Plaintiffs' Motion for Class Certification, the Court having reviewed the briefs and heard oral argument and being fully advised in the premises,

IT IS HEREBY ORDERED:

1. For the reasons and with the findings stated in open Court, the Court certifies a class with respect to the remaining defendants as requested by plaintiffs: All persons in the United States who purchased at retail adulterated orange juice products manufactured or sold by Bodines, Inc., other than the defendants. The defendants remaining in the case are Edward Boden, Sr., Edward Boden, Jr., and Bodines, Inc.

2. Pursuant to Illinois Supreme Court Rule 308, the Court finds that this order involves a question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. The question of law is: whether what is commonly known as "fluid recovery" (various mechanisms involving the assessment of damages to the class as a whole followed by its distribution in the manner most likely to result in benefit to the injured population) is permissible in a class

action in Illinois. The Court believes that the course of the litigation and proofs that would be presented would be substantially facilitated and expedited if "fluid recovery" is available than if it is not available, and that the recoveries of hundreds of thousands or millions of class members would be likely to be defeated if "fluid recovery" were not permissible, allowing not more than a small proportion of the class to recover. There is no Illinois appellate decision squarely on point concerning "fluid recovery," and there is a division of authority in other jurisdictions as to the appropriateness, legality and constitutionality of "fluid recovery."

3. This order is entered *nunc pro tunc* as of December 6, 1990.

Dated: Dec. 7, 1990 /s/ Hon. Robert L. Sklodowski

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THE COURT: This Court feels that consumer protection requires or mandates the Court to attempt to disgorge wrongfully obtained profits.-That makes a compelling argument that transcends much of what the modern effect of class action seems to embody.

The so-called fluid recovery of damages suffered by a class as a whole is something that I think should be embraced by this jurisdiction as it was in California and as it was in the 7th Circuit.

Of course, the inquiry is whether the use of such a mechanism would be consistent with the policies of our consumer fraud statutes and similar consumer fraud statutes throughout the nation, and I think it's compatible. And the proof thus far is that the wrong inflicted upon the public were [sic] intentional.

In any event, this Court feels that as a deterrent that which predominates and almost overwhelms this matter that denial of a class certification would be a gross error.

Accordingly, this Court will certify a class. There are certainly common questions that predominate the of law, [sic] in fact. Liability can be calculated by calculating the amount of the defendants' ill-gotten gains, and eventually, after there is further discovery, certainly, a mechanism can be framed which will adequately distribute and determine what damages were suffered by not only Illinois residence [sic], but residence [sic] in other states.

This Court also finds that the plaintiffs are adequate representatives. This court also finds that the attorneys are adequate attorneys that have the ability to handle this matter. Therefore, the class is hereby certified.

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

KARL HALPERIN, on behalf of himself and as next friend for his minor child JULIE SHAYNE HALPERIN; PAT GORDON; CATHERINE THOMAS; SAM GORDON; MICHELLE CHROMAN, on behalf of herself and as next friend for her minor children ADAM CHROMAN and MELISSA CHROMAN, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	89 CH 6531
	)	Judge Sklodowski
EDWARD BODEN, SR.; BODINE'S, INC., now known as MCCAIN'S OJ INC.; EDWARD BODEN, JR.; ROGER J. WALSH, JR.; DOMINICK'S FINER FOODS, INC.; CERTIFIED GROCERS WAREHOUSE, INC.; and TREASURE ISLAND FOODS, INC., individually and as representatives of a class; and THE KROGER CO.,	)	JURY DEMANDED
Defendants.	)	

THIRD AMENDED COMPLAINT

Plaintiffs, KARL HALPERIN, on behalf of himself and as next friend for his minor child JULIE SHAYNE HALPERIN; PAT GORDON; CATHERINE THOMAS; SAM

GORDON; MICHELLE CHROMAN, on behalf of herself and as next friend for her minor children ADAM CHROMAN and MELISSA CHROMAN, suing individually and on behalf of all others similarly situated, complain as follows against defendants EDWARD BODEN, SR. ("Boden Sr."); BODINE'S, INC. ("Bodine's"); EDWARD BODEN, JR. ("Boden Jr."); ROGER J. WALSH, JR. ("Walsh"); DOMINICK'S FINER FOODS, INC. ("Dominick's"), CERTIFIED GROCERS WAREHOUSE, INC. ("Certified"); TREASURE ISLAND FOODS, INC. ("Treasure Island"); and THE KROGER CO. ("Kroger"). Dominick's, Certified, and Treasure Island ("resellers") are sued as representatives of a class of all resellers similarly situated, as defined below.

INTRODUCTION

1. This action arises from the misrepresentation of orange juice, orange juice from concentrate and frozen orange juice concentrate produced by Bodine's, Inc., which until 1985 was the largest processor of frozen orange juice concentrate in the Midwest. Between 1978 and 1985, Bodine's sold what was represented to be 100% orange juice, orange juice from concentrate and frozen orange juice concentrate (collectively, "orange juice products"). Bodine's, at the direction of Boden Sr., Boden Jr., and Walsh, adulterated the orange juice products with up to 40% beet sugar, corn sugar, monosodium glutamate, and other low-cost inferior ingredients, concealing the substitution from the public. The orange juice products were sold through Dominick's, Certified, Treasure Island, Kroger, and other stores under the Vita-Gold brand and the private brands of the various resellers. Of these stores, Kroger knowingly or recklessly sold adulterated orange juice products.

2. In this action, plaintiffs contend that (a) Bodine's, the three individuals that owned and controlled Bodine's, Kroger, and the resellers committed violations of the Illinois Consumer Fraud Act, *Ill.Rev.Stats.* [sic], ch. 121-1/2, § 261 et seq., and similar "Little FTC Acts" enacted in every other state (Count III), (b) Bodine's, the three individuals that controlled it, and Kroger committed common-law fraud (Count IV), (c) Bodine's, Kroger, and the resellers committed violations of express and implied warranties under the Uniform Commercial Code, *Ill.Rev.Stats.* [sic], ch 26, § 2-313 and § 2-314 (Counts I and II), (d) Kroger aided and abetted Bodine's overall violations of the "Little FTC Acts" and (Count V), and (e) Bodine's and the three individuals violated the federal RICO statute (Count VI).

PARTIES

3. Each of the plaintiffs purchased or consumed orange juice products of the brands and types that were subject to adulteration, as follows:

(a) Pat Gordon resided in Chicago and Highland Park, Illinois during the time the adulteration took place. She purchased liquid orange juice at Dominick's, Treasure Island, and a Certified store, including the Vita-Gold brand and house brands.

(b) Catherine Thomas resided in Hickory Hills, Illinois during the period in which the adulteration took place. She purchased liquid orange juice and frozen concentrate at Dominick's, including the Vita-Gold brand.

(c) Sam Gordon resided in Chicago, Illinois during the period in which the adulteration took place. He purchased frozen orange juice from concentrate and some liquid orange juice at Dominick's, including the Vita-Gold brand.

(d) Michelle Chroman resided in River Woods, Illinois during the period in which the adulteration took place. She purchased, on behalf of herself and her minor children Adam Chroman and Melissa Chroman, frozen orange juice from concentrate at Dominick's, including the Vita-Gold brand.

(e) Karl Halperin and Julie Shayne Halperin purchased orange juice products from Dominick's, under its private brand.

4. On information and belief, based on the magnitude and pervasive nature of the adulteration, each of the plaintiffs believes that he or she purchased adulterated orange juice manufactured by Bodine's. Each plaintiff believed the products purchased to be 100% orange juice products. Each member of the plaintiff class defined below likewise purchased the adulterated orange juice products.

5. Bodine's, now known as McCain's OJ, Inc., is an Illinois corporation. It manufactured adulterated orange juice products, some of which were sold under Bodine's Vita-Gold brand and some under numerous other brands.

6. Each of the following persons was an officer of Bodine's during the time the violations complained of were committed, and personally knew of, authorized, directed, and/or ratified the acts complained of herein.

(a) Edward Boden, Sr.

(b) Edward Boden, Jr.

(c) Roger J. Walsh, Jr.

7. Prior to November 1985, Boden Sr. owned 40% of Bodine's and Boden Jr. 40%. The remaining 20% was owned by the father of Roger J. Walsh, Jr.

8. Dominick's is a Delaware corporation authorized to do business in Illinois. Its registered agent and office are CT Corporation System, 208 S. LaSalle Street, Chicago, IL 60604.

9. Treasure Island is an Illinois corporation. Its registered agent and office are Christ Kamberos, 3460 N. Broadway, Chicago, IL 60657.

10. Certified is, on information and belief, a membership corporation owned by a number of supermarkets that do business under the name "Certified." Its principal place of business is located at 4800 S. Central Avenue, Chicago, Illinois 60638.

11. Certified exists for the purpose of serving as joint purchasing and distribution agent for its members. Its members can secure lower prices by pooling their requirements and purchasing jointly. Certified is not an independent link in the chain of distribution. It does not have the right to cease doing business with member stores at will. Profits that Certified makes that are not necessary for capital requirements are rebated to the member stores in the form of patronage dividends. Certified and its members are intended to and do in fact function as a single, integrated economic entity, being the equivalent of a supermarket chain.

12. Kroger is an Ohio corporation which does business in Illinois. Its registered agent and office are CT Corporation System, 208 S. LaSalle Street, Chicago, IL 60604-1135.

CLASS ALLEGATIONS – PLAINTIFF CLASS

13. Plaintiffs bring this action as a class action under §§ 2-801 et seq. of the Illinois Code of Civil Procedure. The class consists of:

> All persons in the United States who purchased at retail adulterated orange juice products manufactured or sold by Bodine's, Inc., other than the defendants.

14. The class is so numerous that joinder of all members is impracticable. Defendants marketed and sold adulterated orange juice products to thousands of persons.

15. There are questions of law and fact common to the class, including:

(a) Whether defendants sold adulterated orange juice products.

(b) Whether defendants committed unfair and deceptive trade practices by selling adulterated orange juice products.

(c) Whether defendants breached express warranties by selling adulterated orange juice products.

(d) Whether defendants breached implied warranties by selling adulterated orange juice products.

(e) Whether defendants fraudulently concealed their sale of adulterated orange juice products.

(f) Whether the public could reasonably have been expected to learn of the adulteration scheme prior to the indictment of defendants Boden Sr., Boden Jr., and Walsh in July, 1989.

(g) Whether Kroger knowingly or recklessly resold adulterated orange juice products, thereby rendering Kroger liable not only for its own sales, but for all sales of adulterated orange juice products.

16. These common questions predominate over any individual issues. The central issues in the case are whether Bodine's and the individual defendants adulterated orange juice products and whether the other defendants sold those products.

17. Plaintiffs will fairly and adequately represent the claims of the class. Plaintiffs' counsel are experienced and successful in class action litigation, including products liability class actions, and can carry out the responsibility of counsel in class action litigation. Plaintiffs are committed to vigorously protecting the rights of the class.

18. A class action is an appropriate method for the fair and efficient adjudication of this controversy.

CLASS ALLEGATIONS – DEFENDANT CLASS

19. Plaintiffs bring this action against a class of defendants, defined as follows:

> All firms which purchased and resold adulterated orange juice products manufactured or sold by Bodine's, Inc., whether at retail or wholesale.

Defendants Certified, Dominick's and Treasure Island, and the defendant class, are collectively referred to as "resellers."

20. Based on press reports concerning the adulteration, plaintiffs allege that the defendant class is so numerous that joinder of all members is impracticable. According to a statement by Anton Valukas, then United States Attorney for the Northern District of Illinois, the adulterated product was sold through 155 supermarket chains.

21. There are questions of law and fact common to the class, including:

(a) The liability of each defendant class member for breach of express and implied warranties.

(b) The rights of the plaintiffs and plaintiffs' class against each defendant class member

(c) The effect of fraudulent concealment by Bodine's and the individual defendants on the liability of the defendant class.

(d) Whether the public could reasonably have been expected to learn of the adulteration scheme prior to the indictment of defendants Boden Sr., Boden Jr. and Walsh in July 1989.

22. These common questions predominate over any individual issues.

23. Plaintiffs have named as representatives of the defendant class three large firms who can be expected to vigorously litigate the issues affecting the defendant class in defending themselves.

24. A defendant class action is an appropriate method for the fair and efficient adjudication of this controversy.

CONDUCT COMPLAINED OF

25. Between 1978 and 1985, Bodine's sold what was represented on the containers to be 100% orange juice products. Under federal statutes and regulations, each container of orange juice product is required to be labeled as "orange juice," "frozen orange juice from concentrate," etc. Federal regulations also prescribe standards of identity for each of these products—for example, 21 C.F.R. § 146.146 prescribes the ingredients that "frozen concentrated orange juice" may contain—and require that the ingredients be listed on the labels.

26. The "orange juice products" sold by Bodine's were in fact adulterated with up to 40% beet sugar, corn sugar, monosodium glutamate, and other low-cost, inferior ingredients. These ingredients were not permitted to be included in the products by the federal regulations prescribing the standards of identify [sic] for each product, and were not listed on the labels.

27. "Orange juice products" containing these adulterants are at best inferior in value to products which conform to the applicable standards of identify. [sic] Plaintiffs believe that they were of no value, in that a person who desired to purchase artificial orange drink products would purchase one of the numerous artificial orange drink products that were on the market at all relevant times, generally at prices much cheaper than the prices of pure orange juice products.

28. The adulterated orange juice products were sold through Dominick's, Treasure Island, Certified, Kroger, and other stores under the Vita-Gold brand and the private brands of the various supermarkets.

29. The volume of adulterated orange juice products that was sold was massive. For example, between July 1982 and July 1983, Bodine's purchased over 188,000 gallons of evaporator waste water for inclusion in "orange juice products." Between 1983 and 1985, Bodine's purchased approximately 37.5 million pounds of beet sugar from one source for inclusion in "orange juice products." Between January 1985 and March 1985, Bodine's purchased another 937,000 pounds of beet sugar from another source for inclusion of "orange juice products." A third source furnished 1.6 million pounds of beet sugar during the first six months of 1985, and a fourth 4.2 million pounds during the same period.

30. Between 1978 and 1985, Bodine's sales increased from approximately $3 million per anum to approximately $100 million per anum. Bodine's achieved this remarkable increase in sales by selling its product significantly more cheaply than other major producers of orange juice products. On information and belief, Bodine's was able to do this in large part by adulterating its products.

31. As a result, Bodine's became the largest producer of "orange juice products" in the Midwest.

32. Bodine's rapidly acquired a reputation in the food industry for adulterating citrus products. Plaintiffs are informed and believe that any supermarket chain would have been a recipient of such reports. These allegations are based on information supplied by the Florida Department of Citrus, a state agency.

33. During the period 1978-85, scientific tests existed that could detect adulterants in orange juice products. Information concerning these tests and the manner in which they should be performed was available in trade and professional journals, such as the Journal of Food Science, the Journal of the Association of Official Analytical Chemists, and publications of the American Chemical Society.

34. Bodine's engaged in this conduct at the direction of, and was aided and abetted by, Boden Sr., Boden Jr., and Walsh.

35. In December 1989, the individual defendants pleaded guilty to federal criminal charges arising from the adulteration.

FRAUDULENT CONCEALMENT AND DISCOVERY

36. Defendants Bodine's, Boden Sr., Boden Jr., Walsh and Kroger concealed the sale of adulterated orange juice products from the public, by knowingly affixing false labeling to Bodine's products. These representations were repeated to the public by each of the resellers when they resold orange juice products bearing the false labeling.

37. Each of the resellers knew or reasonably should have known that Bodine's was or may have been adulterating orange juice products, in that Bodine's had a reputation in the food industry for adulterating citrus products and Bodine's was selling at unusually low prices compared to other major producers. The resellers either tested food products that they sold or could readily have arranged for such testing.

38. Each of the resellers was in privity with Bodine's. Each of the resellers had a right to indemnification from Bodine's for any breach of warranty with respect to the goods, under § 2-607(5) of the Uniform Commercial Code.

39. Concealment was essential to and inherent in the successful sale of the adulterated products as 100% orange juice products. If there are any persons who would be willing to consume beet sugar, corn sugar, monosodium glutamate, and other low-cost, inferior ingredients, they would not have purchased 100% orange juice products, and would not have paid the price of 100% orange juice products. Furthermore, since the sale of adulterated foods is a criminal offense and can result in the seizure of the adulterated products by state and federal regulatory agencies, it was imperative that the adulterated character of the products not be known.

40. The public did not, and could not reasonably have been expected to, learn of the adulteration scheme until late July, 1989, when Boden Sr., Boden Jr., and Walsh were indicted in the United States District Court for the Northern District of Illinois.

41. As a result, any applicable statute of limitations is tolled under the doctrine of fraudulent concealment.

ADDITIONAL INVOLVEMENT OF KROGER

42. Kroger was a major reseller of the adulterated orange juice products. Kroger resold them under the Cost Cutter and Avondale brand names.

43. In May 1983, attorneys for the Florida Department of Citrus contacted Kroger, advised it that samples of Cost Cutter frozen concentrated orange juice containing adulterants had been found in a Kroger store, and requested that Kroger participate in a testing program. Kroger declined to so participate. The Cost Cutter brand is Kroger's house brand.

44. On information and belief, Kroger purchased the adulterated orange juice products from Bodine's at such unusually low prices in relation to other major volume sellers of orange juice products that they were placed on notice of the suspicious character of Bodine's products and should have arranged for their testing.

45. On information and belief, Kroger acquired knowledge of facts indicating that it was reselling adulterated orange juice products manufactured by Bodine's as a result of:

(a) Laboratory tests performed as early as 1979-80.

(b) In April 1982, a Kroger lab supervisor recommended that Bodine's be dropped as an approved supplier. The recommendation was not acted upon.

(c) Warnings from the Florida Department of Citrus, an agency of the State of Florida.

(d) Communications with the Federal Food & Drug Administration during 1983.

(e) In 1983, the FDA seized a substantial quantity of Bodine's orange juice products, some of it packed under Kroger labels, based on findings that it was adulterated.

46. In June 1983, after Kroger learned of the FDA's seizure of adulterated orange juice products manufactured by Bodine's and packed under Kroger labels, Kroger wrote to the Associate FDC Commissioner for Regulatory Affairs complaining that "this seizure action was unwarranted, was an unnecessary waste of taxpayer's funds, and will damage Kroger's reputation and the value of the two brand names involved." The FDA action was attributed to "pressures generated by various parties on behalf of the Florida citrus industry."

47. Thereafter, Kroger continued to sell orange juice products purchased from Bodine's. Had Kroger disclosed the scheme, or pursued appropriate inquiries after being placed on notice of possible adulteration, the scheme would have been aborted.

48. Kroger also continued to sell products with knowledge of the facts set forth above.

49. Kroger engaged in these actions so that it could continue to purchase orange juice products at unusually low prices.

50. By continuing to sell orange juice products with knowledge of their adulterated character, and by attempt-

ing to forestall the Food & Drug Administration, Kroger entered into express or tacit collusion with Bodine's and the individuals controlling Bodine's, or recklessly disregarded facts placing it on notice of possible adulteration, and is jointly and severally liable with them for their sales and/or the entire market share.

COUNT I – EXPRESS WARRANTY

51. Plaintiffs incorporate ¶¶ 1-50 by reference.

52. Each package of adulterated orange juice product represented, on its container, that it was 100% orange juice product. This representation, as a result of the federal regulations prescribing standards of identity for orange juice products, constitutes a representation that the product sold conforms to the applicable federal standard of identity. Each package of adulterated orange juice product also stated on its container what purported to be a complete list of its ingredients.

53. These representations were made directly to plaintiffs and the class members. Each plaintiff and class member received them when they purchased the containers of orange juice products which they purchased. The representations were part of the basis of the bargain with respect to each purchase of the adulterated product. Each purchase of the purported 100% orange juice products was made in reliance on the representation that the products being purchased were 100% orange juice products.

54. These representations constituted an express warranty by Bodine's and each reseller that the products sold were 100% orange juice products that conformed to the applicable federal standards of identity and contained only those ingredients listed on the containers.

55. Defendants Bodine's, Kroger, and the resellers breached their express warranty, in that the product sold was not 100% orange juice product, did not conform to the applicable federal standards of identity, and consisted in large part of ingredients that were not listed on the containers and were inferior in value to the listed ingredients.

56. Plaintiff and each class member has been damaged by defendants' breach of warranty in the manner described above.

COUNT II – IMPLIED WARRANTY OF MERCHANTABILITY

57. Plaintiffs incorporate ¶¶ 1-50 by reference.

58. Plaintiffs and the class members are purchasers of goods for purposes of Article 2 of the Uniform Commercial Code.

59. Bodine's, Kroger, and each reseller was a merchant of food products. As merchants, these defendants made certain implied warranties under UCC § 2-314, including:

(a) That the purported 100% orange juice products conformed to the promises or affirmations of fact in the products' packagings or labelling. The affirmations of fact included the statement of the product, which incorporates a federal standard of identity, and the list of ingredients on each container, which is required to be complete and accurate.

(b) That the orange juice products were of fair average quality and passed in the food business and trade as 100% orange juice products.

60. Said defendant have breached their warranties, in that the purported 100% orange juice products were adul-

terated, did not conform to the promises and affirmations of fact on the packaging, were not of fair average quality for 100% orange juice products, and did not pass in the food business as such.

61. Plaintiffs and the class members have been damaged by said defendants' breach of warranty in the manner described above.

COUNT III – LITTLE FTC ACTS

62. Plaintiffs incorporates ¶¶ 1-50 by reference.

63. At all relevant times, § 2 of the Illinois Consumer Fraud and Deceptive Business Practices Act, *Ill.Rev.Stats.* [sic] ch. 121-1/2, ¶ 262, provided that "[U]nfair or deceptive acts or practices . . . in the conduct of any trade or commerce are hereby declared unlawful . . . ." Similar statutes, patterned after § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and prohibiting unfair or deceptive acts or practices, exist in every other state.

64. Defendants Bodine's, Boden Sr., Boden Jr., Walsh, Kroger and the resellers deceptively represented that the adulterated products were 100% orange juice products, with the intent that purchasers would rely on the representations.

65. Defendants Bodine's, Boden Sr., Boden Jr., Walsh, Kroger and the resellers failed to disclose the fact that the adulterated orange juice products were adulterated. This omission was made with the intention of inducing the purchase of the adulterated orange juice products.

66. Defendants Bodine's, Boden Sr., Boden Jr., Walsh, Kroger and the resellers thereby engaged in unfair or deceptive acts or practices.

67. As a result of these unfair or deceptive acts or practices, the adulterated orange juice products were purchased by plaintiffs and the class members.

68. As a result of these unfair or deceptive acts or practices, plaintiffs and the class members were damaged, as described above.

69. The public did not, and could not reasonably have been expected to, learn of the adulteration scheme until late July 1989, when Boden Sr., Boden Jr., and Walsh were indicted in the United States District Court for the Northern District of Illinois.

COUNT IV – FRAUD

70. Plaintiffs incorporate ¶¶ 1-50 by reference.

71. Defendants Bodine's, Boden Sr., Boden Jr., Walsh and Kroger repeatedly represented in packaging and otherwise that the products they were selling were 100% orange juice products.

72. By representing that a container was filled with, for example, "orange juice," defendants represented that the contents conformed to the federal standard of identity for "orange juice."

73. By listing certain ingredients on the container—for example, "orange juice" in the case of "orange juice"—defendants represented that the listed ingredients were the only ingredients in the container.

74. The products that these defendants sold were not in fact 100% orange juice products, but were adulerated as described above.

75. These defendants made the representations described above with knowledge of or in reckless disregard of their falsity.

76. Defendants' representations and omissions were made with the intent that plaintiffs and the class members would rely on them by purchasing the purported 100% orange juice products.

77. These representations were made directly to plaintiffs and the class members, by means of affixing them to each container of adulterated product.

78. Plaintiffs and the class members relied on these defendants' representations. No reasonable individual would intend to purchase a conglomeration of beet sugar and other adulterants, while paying the price of genuine 100% orange juice products.

79. As a result of these representations and omissions, plaintiffs and the class members were induced to pay money.

COUNT V – KROGER'S LIABLITY UNDER LITTLE FTC ACTS FOR AIDING AND ABETTING BODINE'S

80. Plaintiffs incorporate ¶¶ 1-50 by reference.

81. At all relevant times, § 2 of the Illinois Consumer Fraud and Deceptive Business Practices Act, *Ill.Rev.Stats.* [sic], ch. 121-1/2, ¶ 262, provided that "[U]nfair or deceptive acts or practices . . . in the conduct of any trade or commerce are hereby declared unlawful . . . ." Similar statutes, patterned after § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and prohibiting unfair or deceptive acts or practices, exist in every other state.

82. Kroger aided and abetted the conduct of Bodine's, Boden Sr., Boden Jr. and Walsh, by engaging in the acts, described above, which facilitated the continuation of their adulteration scheme.

83. Kroger thereby engaged in unfair or deceptive acts or practices.

84. As a result of these unfair or deceptive acts or practices, the adulterated orange juice products were purchased by plaintiffs and the class members.

85. As a result of these unfair or deceptive acts or practices, plaintiffs and the class members were damaged, as described above.

COUNT VI – RICO

86. Plaintiffs incorporate ¶¶ 1-50 by reference.

87. This count is brought against defendants Bodine's, Boden Sr., Boden Jr. and Walsh.

88. The knowing sale of adulterated orange juice products, representing on the labels that they are genuine orange juice products, constitutes a scheme or artifice to defraud within the meaning of the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343.

89. On information and belief, the United States mails were used in connection with the sale of the adulterated orange juice products, in placing orders for the products and obtaining the purchase price of the products.

90. On information and belief, interstate wire transmissions were used in connection with the sale of the adulterated orange juice products, in placing orders for the products.

91. All of these uses of the mails and wires took place in the ordinary course of business, were foreseeable by all defendants, and were in furtherance of the ultimate objective of the fraudulent transaction—to obtain money.

92. Bodine's is, and was during the time of the sale of the adulterated orange juice products, an enterprise within the meaning of 18 U.S.C. § 1961(4). Its activities affected interstate commerce. Bodine's sold orange juice products in numerous states, shipping the product from Illinois into those other states.

93. Bodine's participated as a principal in this scheme and then used the proceeds of the scheme in its operations, in violation of 18 U.S.C. § 1962(a). Execution of the scheme materially assisted Bodine's in increasing its revenues and prolonging its business.

94. Boden Sr., Boden Jr. and Walsh each conducted the affairs of Bodine's through the scheme, in violation of 18 U.S.C. § 1962(c).

95. Plaintiffs and the class members were injured in their business or property as a result of these violations, in that they purchased adulterated orange juice.

WHEREFORE, plaintiffs requests the following relief:

(A) That this Court enter an order certifying this action as a class action.

(B) That this Court require defendants and the defendant class to pay plaintiffs and each plaintiff class member the damages they suffered, trebled in the case of Bodine's and the individual defendants under Count VI.

(C) That this Court require defendants Bodine's, Boden Sr., Boden Jr., Walsh and Kroger, jointly and severally, to pay punitive damages to plaintiffs and each plaintiff class member in an amount that the Court deems just and appropriate.

(D) That this Court require defendants and the defendant class to pay reasonable attorney's fees, litigation expenses, and costs.

(E) That the Court provide such other and further relief as is just and appropriate.

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United States Constitution

ARTICLE IV. *Section 1.* Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof.

ARTICLE VI. *Clause 2.* Supreme Law of Land. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENT XIV — Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 U.S.C. § 1964

Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest

himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

Illinois Revised Statutes, Chapter 110A

315. (Supreme Court Rule 315). Leave to Appeal From the Appellate Court to the Supreme Court

(a) *Petition for Leave to Appeal; Grounds.* Except as provided below for appeals from the Industrial Commission division of the Appellate Court, a petition for leave to appeal to the Supreme Court from the Appellate Court may be filed by any party, including the State, in any case not appealable from the Appellate Court as a matter of right. Whether such a petition will be granted is a mat-

ter of sound judicial discretion. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed. However, no petition for leave to appeal from a judgment of the five-judge panel of the Appellate Court designated to hear and decide cases involving review of Industrial Commission orders shall be filed, unless at least one judge of that panel files a statement that the case in question involves a substantial question which warrants consideration by the Supreme Court. A motion asking that such a statement be filed may be filed as a prayer for alternative relief in a petition for rehearing, but must, in any event, be filed within the time allowed for filing a petition for rehearing.

317. (Supreme Court Rule 317). Appeals from the Appellate Court to the Supreme Court as of Right

Appeals from the Appellate Court shall lie to the Supreme Court as a matter of right in cases in which a question under the Constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court. The appeal shall be initiated by filing a petition in the form prescribed by Rule 315, except that the petition shall be entitled "Petition for Appeal as a Matter of Right", item (1) of the petition shall state that the appeal is taken as a matter of right, and item (5) shall contain argument as to why appeal to the Supreme Court lies as a matter of right. In other respects the procedure is governed by Rule 315. If leave to appeal is to be sought in the alternative, the request therefor must be included in the same petition, and item (1) thereof shall include an alternative prayer for leave to appeal, and item (5) the argument as to why in the alter-

native leave to appeal should be allowed as a matter of sound judicial discretion. When both appeal as a matter of right and leave to appeal are sought, both requests will be disposed of by a single order. If the court allows the petition, briefs, and abstracts in cases in which they are required, shall be filed as provided in the case of appeal by leave under Rule 315.

Illinois Revised Statutes, Chapter 110

2-801. *Prerequisites for the maintenance of a class action*

§ 2-801. Prerequisites for the maintenance of a class action. An action may be maintained as a class action in any court of this State and a party may sue or be sued as a representative party of the class only if the court finds:

(1) The class is so numerous that joinder of all members is impracticable.

(2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.

(3) The representative parties will fairly and adequately protect the interest of the class.

(4) The class action is an appropriate method for the fair and efficient adjudication of the controversy.

2-802. *Order and findings relative to the class*

§ 2-802. Order and findings relative to the class.

(a) Determination of Class. As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it may be so maintained and describe those whom the court finds to be members of the class. This order may be conditional and may be amended before a decision on the merits.

(b) Class Action on Limited Issues and Subclasses. When appropriate, an action may be brought or main-

tained as a class action with respect to particular issues, or divided into sub-classes and each sub-class treated as a class. The provisions of this rule shall then be construed and applied accordingly.

2-803. *Order and findings relative to the class*

§ 2-803. Notice in class cases. Upon a determination that an action may be maintained as a class action, or at any time during the conduct of the action, the court in its discretion may order such notice that it deems necessary to protect the interests of the class and the parties.

An order entered under subsection (a) of Section 2-802 of this Act, determining that an action may be maintained as a class action, may be conditioned upon the giving of such notice as the court deems appropriate.

2-804. *Intervention by and exclusion of class members*

§ 2-804. Intervention by and exclusion of class members. (a) Intervention. Any class members seeking to intervene or otherwise appear in the action may do so with leave of court and such leave shall be liberally granted except when the court finds that such intervention will disrupt the conduct of the action or otherwise prejudice the rights of the parties or the class.

(b) Exclusion. Any class member seeking to be excluded from a class action may request such exclusion and any judgment entered in the action shall not apply to persons who properly request to be excluded.

2-805. *Judgments in class cases*

§ 2-805. Judgments in class cases. Any judgment entered in a class action brought under Section 2-801 of this Act shall be binding on all class members, as the class is defined by the court, except those who have been properly excluded from the class under subsection (b) of Section 2-804 of this Act.

2-806. *Dismissal or compromise of class cases*

§ 2-806. Dismissal or compromise of class cases. Any action brought as a class action under Section 2-801 of this Act shall not be compromised or dismissed except with the approval of the court and, unless excused for good cause shown, upon notice as the court may direct.

ARKANSAS CODE OF 1987
TITLE 4. BUSINESS AND COMMERCIAL LAW
SUBTITLE 7. CONSUMER PROTECTION
CHAPTER 88. DECEPTIVE TRADE PRACTICES

4-88-101. Applicability of chapter.

This chapter does not apply to:

(1) Advertising or practices which are subject to and which comply with any rule, order, or statute administered by the Federal Trade Commission;

(2) Broadcasters, printers, publishers, and other persons engaging in the dissemination of information who do not have actual knowledge of the intent, design, purpose, or deceptive nature of the advertising or practice;

(3) Actions or transactions permitted under laws administered by the State Insurance Commissioner, Arkansas Securities Commissioner, Arkansas Public Service Commission, Arkansas State Highway Commission, Bank Commissioner, or other regulatory body or officer acting under statutory authority of this state or the United States, unless a director of these divisions specifically requests the Attorney General to implement the powers of this chapter.

* * * *

4-88-108. Concealment, suppression, or omission of material facts.

The act, use, or employment by any person of any deception, fraud, or false pretense, or the concealment, suppression, or omission of any material fact with intent that others rely upon the concealment, suppression, or omission, in connection with the sale or advertisement of any goods or services is declared to be an unlawful practice.

* * * *

4-88-111. Investigations—Procedure—Confidential information.

(a) When the Attorney General determines that an investigation should be made as to whether a person has

engaged in, is engaging in, or shows evidence of intent to engage in any practice declared to be unlawful by this chapter, when he receives a request for enforcement proceedings from a consumer or labor organization, better business bureau, chamber of commerce, or any state agency, or when he receives a written complaint from a consumer of a practice declared to be unlawful under this chapter, he may:

(1) Require that person to file a statement or report in writing as to the facts and circumstances concerning the matter, together with such other data as may be reasonably related thereto;

(2) Examine under oath, or take the deposition of any person in connection with the matter;

(3) Examine any merchandise, or sample thereof, sales tickets, or other records relating thereto.

(b) Unless otherwise ordered by a court for good cause shown, no statement or documentary material produced pursuant to a demand under this section shall be produced for inspection or copying by, nor shall the contents thereof be disclosed to, any person other than the authorized employee of the Attorney General without the consent of the person who produced the material.

(c) The Attorney General or any attorney designated by him may use the documentary material or copies thereof in the enforcement of this chapter by presentation before any court, provided that any such material which contains trade secrets shall not be presented except with the approval of the court in which the action is pending after adequate notice to the person furnishing such material. However, when material containing trade secrets is presented with court approval, the material and the evidence pertaining thereto shall be held in camera and shall not be part of the court record or trial transcript.

4-88-112. Failure to cooperate in investigations—Proceedings.

(a) In the event any person fails or refuses to file a statement, appear, or produce records as required by § 4-88-111, the Attorney General, acting through the Consumer Counsel, may file, in the chancery court of the county in which the person resides or transacts business or of the judicial district in which the State Capitol is located, a petition for an order of such court for the civil enforcement of such section.

(b) Upon the filing of the petition and service upon the person, the court shall have jurisdiction to hear and determine the matter so presented and to enter such order, including temporary injunctions, as may be required to effectuate this chapter.

(c) Willful concealment, destruction, alteration, or falsification of any documentary material which would be subject to subpoena by the court or the disobedience of any order of the court is declared to be unlawful and shall be punished as contempt of court.

(d) Any final order shall be subject to appeal to the Supreme Court of Arkansas.

CODE OF GEORGIA

TITLE 10. COMMERCE AND TRADE
CHAPTER 1. SELLING AND OTHER TRADE PRACTICES
ARTICLE 15. DECEPTIVE OR UNFAIR PRACTICES
PART 2. FAIR BUSINESS PRACTICES ACT

10-1-390. Short title.

This part shall be known and may be cited as the "Fair Business Practices Act of 1975."

(GA. L. 1975, p. 376, s 1.)

10-1-391. Purpose and construction of part.

(a) The purpose of this part shall be to protect consumers and legitimate business enterprises from unfair or deceptive practices in the conduct of any trade or commerce in part or wholly in the state. It is the intent of the General Assembly that such practices be swiftly stopped, and this part shall be liberally construed and applied to promote its underlying purposes and policies.

(b) It is the intent of the General Assembly that this part be interpreted and construed consistently with interpretations given by the Federal Trade Commission in the federal courts pursuant to Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. Section 45(a)(1)), as from time to time amended.

* * * *

10-1-399. Civil or equitable remedies by individuals.

(a) Any person who suffers injury or damages as a result of consumer acts or practices or as a result of office supply transactions in violation of this part or whose business or property has been injured or damaged as a result of consumer acts or practices or as a result of office supply transactions in violation of this part may bring an action individually, but not in a representative capacity,

against the person or persons engaged in such unlawful consumer acts or practices or in such unlawful office supply transactions under the rules of civil procedure to seek equitable injunctive relief and to recover his general and exemplary damages sustained as a consequence thereof in any court having jurisdiction over the defendant; provided, however, exemplary damages shall be awarded only in cases of intentional violation. Notwithstanding any other provisions of law, a debtor seeking equitable relief to redress an injury resulting from a violation of paragraph (20) of subsection (b) of Code Section 10-1-393, upon facts alleged showing a likelihood of success on the merits, may not, within the discretion of the court, be required to make a tender. Nothing in this subsection or paragraph (20) of subsection (b) of Code Section 10-1-393 shall be construed to interfere with the obligation of the debtor to a lender who is not in violation of paragraph (20) of subsection (b) of Code Section 10-1-393. A claim under this Code section may also be asserted as a defense, setoff, cross-claim, or counterclaim or third-party claim against such person.

(b) At least 30 days prior to the filing of any such action, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be delivered to any prospective respondent. Any person receiving such a demand for relief who, within 30 days of the delivering of the demand for relief, makes a written tender of settlement which is rejected by the claimant may, in any subsequent action, file the written tender and an affidavit concerning this rejection and thereby limit any recovery to the relief tendered if the court finds that the relief tendered was reasonable in relation to the injury actually suffered by the petitioner. The demand requirements of this subsection shall not apply if the prospective respondent does not maintain a place of business or does not keep assets within the state. The 30 day requirement of this subsection shall not apply to a debtor seeking a temporary restraining order to redress or prevent

an injury resulting from a violation of paragraph (20) of subsection (b) of Code Section 10-1-393, provided that said debtor gives, or attempts to give the written demand required by this subsection at least 24 hours in advance of the time set for the hearing of the application for the temporary restraining order. Such respondent may otherwise employ the provisions of this Code section by making a written offer of relief and paying the rejected tender into court as soon as practicable after receiving notice of an action commenced under this Code section. All written tenders of settlement such as described in this subsection shall be presumed to be offered without prejudice in compromise of a disputed matter.

(c) Subject to subsection (b) of this Code section, a court shall award three times actual damages for an intentional violation.

(d) If the court finds in any action that there has been a violation of this part, the person injured by such violation shall, in addition to other relief provided for in this Code section and irrespective of the amount in controversy, be awarded reasonable attorneys' fees and expenses of litigation incurred in connection with said action; provided, however, the court shall deny a recovery of attorneys' fees and expenses of litigation which are incurred after the rejection of a reasonable written offer of settlement made within 30 days of the mailing or delivery of the written demand for relief required by this Code section; provided, further, that, if the court finds the action continued past the rejection of such reasonable written offer of settlement in bad faith or for the purposes of harassment, the court shall award attorneys' fees and expenses of litigation to the adverse party. Any award of attorneys' fees and expenses of litigation shall become a part of the judgment and subject to execution as the laws of Georgia allow.

(e) Any manufacturer or supplier of merchandise whose act or omission, whether negligent or not, is the basis for action under this part shall be liable for the damages

assessed against or suffered by retailers charged under this part. A claim of such liability may be asserted by cross-claim, third-party complaint, or by separate action.

(f) It shall not be a defense in any action under this part that others were, are, or will be engaged in like practices.

(g) In any action brought under this Code section the administrator shall be served by certified or registered mail with a copy of the initial complaint and any amended complaint within 20 days of the filing of such complaint. The administrator shall be entitled to be heard in any such action, and the court where such action is filed may enter an order requiring any of the parties to serve a copy of any other pleadings in an action upon the administrator.

* * * *

CONSOLIDATED LAWS OF NEW YORK
GENERAL BUSINESS LAW
CHAPTER 20 OF THE CONSOLIDATED LAWS
ARTICLE 22-A-CONSUMER PROTECTION FROM DECEPTIVE ACTS AND PRACTICES

§ 349. Deceptive acts and practices unlawful

(a) Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.

(b) Whenever the attorney general shall believe from evidence satisfactory to him that any person, firm, corporation or association or agent or employee thereof has engaged in or is about to engage in any of the acts or practices stated to be unlawful he may bring an action in the name and on behalf of the people of the state of New York to enjoin such unlawful acts or practices and to obtain restitution of any moneys or property obtained directly or indirectly by any such unlawful acts or practices. In such action preliminary relief may be granted under article sixty-three of the civil practice law and rules.

(c) Before any violation of this section is sought to be enjoined, the attorney general shall be required to give the person against whom such proceeding is contemplated notice by certified mail and an opportunity to show in writing within five business days after receipt of notice why proceedings should not be instituted against him, unless the attorney general shall find, in any case in which he seeks preliminary relief, that to give such notice and opportunity is not in the public interest.

(d) In any such action it shall be complete defense that the act or practice is, or if in interstate commerce would be, subject to and complies with the rules and regulations of, and the statutes administered by, the federal trade commission or any official department, division, commission or agency of the United States as such rules, regulations or statutes are interpreted by the federal trade com-

mission or such department, division, commission or agency or the federal courts.

(e) Nothing in this section shall apply to any television or radio broadcasting station or to any publisher or printer of a newspaper, magazine or other form of printed advertising, who broadcasts, publishes, or prints the advertisement.

(f) In connection with any proposed proceeding under this section, the attorney general is authorized to take proof and make a determination of the relevant facts, and to issue subpoenas in accordance with the civil practice law and rules.

(g) This section shall apply to all deceptive acts or practices declared to be unlawful, whether or not subject to any other law of this state, and shall not supersede, amend or repeal any other law of this state under which the attorney general is authorized to take any action or conduct any inquiry.

(h) In addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.1

In compliance with this Court's Rule 29.1, a list of parent corporations of Bodine's, Inc. follows: McCain Citrus, Inc., McCain U.S.A., Inc. and McCain Foods Limited. Bodine's, Inc. has no subsidiaries.

Supreme Court, U.S.
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No. 92-008

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

BODINE'S, INC.,

Petitioner,

v.

PAT GORDON, CATHERINE THOMAS, SAM GORDON, MICHELLE CHROMAN, ADAM CHROMAN; MELISSA CHROMAN; EDWARD BODEN, SR. and EDWARD BODEN, JR.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST JUDICIAL DISTRICT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents are dissatisfied with the statement of the questions presented by Petitioners.

1. The first question listed by Petitioners should be rephrased: "Whether a state court may, consistent with the due process clause of the Fourteenth Amendment, determine that fluid recovery is a permissible remedy under state law?"

2. The second question listed by Petitioners should be rephrased: "May an Illinois court, consistent with the due process of the Fourteenth Amendment, apply the law of Illinois to the claims of residents of other states against a business which (a) was located in Illinois, (b) devised within the state of Illinois a scheme to manufacture and sell adulterated 'orange juice,' (c) manufactured within the state of Illinois large quantities of a liquid purporting to be '100% pure orange juice,' but which consisted largely of adulterants, and (d) distributed the liquid to numerous purchasers, some within the state of Illinois and some residing elsewhere."

3. The third question listed by Petitioners is not involved in this case.

4. The fourth question listed by Petitioners has not been addressed by the Illinois Appellate Court, which discussed "fluid recovery" in the context of the Illinois Consumer Fraud Act.

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No. 92-008

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

BODINE'S, INC.,

Petitioner,

v.

PAT GORDON, CATHERINE THOMAS, SAM GORDON, MICHELLE CHROMAN, ADAM CHROMAN; MELISSA CHROMAN; EDWARD BODEN, SR. and EDWARD BODEN, JR.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST JUDICIAL DISTRICT

BRIEF IN OPPOSITION

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondents Pat Gordon, Catherine Thomas, Sam Gordon, Michelle Chroman, Adam Chroman, and Melissa Chroman pray that the Court decline to issue a writ of certiorari in this case.

STATEMENT OF THE CASE

The Petition substantially misstates the nature of the case and omits material facts.

First, the Petition leads the Court to believe that the supermarket defendants are still parties to this case. The supermarkets were in fact dismissed with prejudice by the trial court.

Second, the Petition fails to disclose the precise nature of the conduct that gives rise to this action, or that respondents Edward Boden, Sr. and Edward Boden Jr. have plead guilty to criminal charges arising out of the adulteration.

The Third Amended Complaint (A20) alleges that this action arises from a massive criminal scheme to adulterate orange juice products (orange juice, orange juice from concentrate and frozen orange juice concentrate) manufactured by defendant Bodine's, Inc. ("Bodine's"). In 1978, Bodine's was a small producer of orange juice concentrate. By 1985, Bodine's had become the largest processor of frozen orange juice concentrate in the Midwest. The reason for the remarkable growth is that Bodine's sold what was represented to be 100% pure orange juice products, but was in fact adulterated.

The products were prominently labelled as 100% pure orange juice. In fact, the orange juice products were intentionally adulterated with up to 40% beet sugar, corn sugar, monosodium glutamate, and other low-cost, inferior ingredients.

The scope of the fraud is indicated by the fact that the criminal indictment alleged, as overt acts, the purchase of *tens of thousands of tons* of adulterants. For example, between July 1982 and July 1983, Bodine's purchased over 188,000 gallons of evaporator waste water for

inclusion in "orange juice products." Between 1983 and 1985, Bodine's purchased approximately 37.5 million pounds of beet sugar from one source for inclusion in "orange juice products." Between January 1985 and March 1985, Bodine's purchased another 937,000 pounds of beet sugar from another source for inclusion in "orange juice products." A third source furnished 1.6 million pounds of beet sugar during the first six months of 1985, and a fourth 4.2 million pounds during the same period.

Between 1978 and 1985, Bodine's sales increased from approximately $3 million per annum to approximately $100 million per annum. Bodine's achieved this remarkable increase in sales by selling its product significantly more cheaply than other major producers of orange juice products. Bodine's was able to do this in large part by adulterating its products.

The substitution of the inferior ingredients was concealed from the public. Concealment was essential to the successful sale of the adulterated products as 100% orange juice products because even if there was someone who would be willing to consume the adulterants, they would not have purchased 100% orange juice products and would not have paid the price of 100% orange juice products. The average member of the public did not, and could not reasonably have been expected to, learn of this scheme until the return of the 19-count indictment by the federal grand jury, in July 1989. This action was filed soon after the indictment was announced.

At all times when the adulterated products were sold, there were artificial orange drink products on the market available to anyone who cared to purchase orange-flavored drinks that were not 100% pure orange juice. These

artificial orange drink products were much cheaper than pure orange juice products.

The defendants remaining in the case are Bodine's and its former principals – the individuals directly responsible for the fraud. The individuals have pleaded guilty to part of the indictment, pursuant to a plea bargain agreement. Edward Boden Sr. received two years in prison, 1,000 hours of community service, and a $250,000 fine. Edward Boden Jr. received two years probation, a $200,000 fine, and 200 hours of community service. Roger Walsh Jr. received two years probation and 200 hours of community service. Neither they nor their company have been required to disgorge the unlawful revenues they derived from selling adulterated "orange juice."

Third, the Petition makes factual representations that are not supported by anything in the record. In particular, the Petition makes unsupported factual representations that the present owners of Bodine's "had no knowledge of" the adulteration and "cooperated fully with federal authorities' investigation of the former owners." (Petition, p. 3 n.2) These are matters to be explored during discovery.

Fourth, the Petition represents that "the nationwide class is, and likely will remain, utterly unidentifiable." (Petition, p. 3) In fact, several of the named plaintiffs retained labels or other proofs of purchase from the "orange juice."

The trial court found in its order certifying a class that *many* of the class members would not be able to prove their precise purchases through documentary evidence. Some of the class members, including several of the named plaintiffs, do have proofs of purchase of the products in question, such as labels, coupons, Uniform Product Codes (the bar code found on most grocery

packaging). (Bodine's conducted promotions requiring submission of labels or Uniform Product Codes from time to time, and some people kept theirs.) However, it is likely that most of the class members will not be able to document all of their purchases.

Fifth, the Petition represents that "fluid recovery will dispense with giving notice of the pending action to plaintiff class members until after liability is determined" (Petition, p. 3). We are totally unable to discern the basis for this representation. Neither the trial court nor the appellate court addressed the issue of whether notice should be given, or in what form.

STATUTORY PROVISIONS

The Petition does not refer to any pertinent statutory provisions.

Respondents believe that the Illinois Consumer Fraud Act is material.

Illinois Consumer Fraud and Deceptive Business Practices Act, §2, *Ill. Rev. Stats.*, ch. 121-1/2, ¶262:

> [U]nfair or deceptive acts or practices, including but not limited to the use of employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965 [*Ill. Rev. Stats.*., ch. 121-1/2, ¶312], in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact

> been misled, deceived or damages thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act [15 U.S.C. §45].

Illinois Consumer Fraud and Deceptive Business Practices Act, §10a, *Ill. Rev. Stats.*, ch. 121-1/2, ¶270a:

> (a) Any person who suffers damage as a result of a violation of this Act committed by any other person may bring an action against such person. The court, in its discretion may award actual damages or any other relief which the court deems proper. Proof of a public injury, a pattern, or an effect on consumers generally shall not be required.

SUMMARY OF ARGUMENT

The only issue presented is whether Illinois courts, in enforcing the Illinois Consumer Fraud and Deceptive Business Practices Act, can enter a judgment against a perpetrator of consumer fraud who operates within Illinois in the amount of the ill-gotten gains secured through the fraud, and then distribute the ill-gotten gains to consumers. No issues are presented under RICO or any other federal statute.

Illinois' adoption of this "fluid recovery" procedure to insure the disgorgement of ill-gotten gains by perpetrators of consumer fraud raises no significant federal constitutional question. It does not violate Petitioners' substantive due process rights because preventing consumer fraud is a permissible state objective and depriving perpetrators of consumer fraud of the money they obtain through such conduct is a rational means of achieving that objective. It does not violate Petitioners' procedural

due process rights because fair and accurate legal procedures are used to determine the amount of the ill-gotten gains.

Petitioners' argument that they cannot be deprived of their ill-gotten gains unless the individuals from whom the money was taken has no merit. The constitutionality of the many state and federal statutes that provide for the forfeiture of the proceeds of illegal activity is clear. The fact that an aggrieved consumer is allowed to bring the suit likewise raises no constitutional issues – this Court has upheld "informer statutes" which permit anyone to bring such an action.

The rights of the consumers from whom the money was illegally taken are also not violated. As long as the consumers are given the best notice practicable under the circumstances and an adequate opportunity to make claims, their rights are fully protected. Nothing in the record even remotely suggests that the consumers' rights will be disregarded. Furthermore, Petitioners do not have standing to invoke the rights of the consumers whom they have defrauded.

Petitioners' argument that due process precludes Illinois from distributing their ill-gotten gains to consumers who do not reside within Illinois has no basis. Petitioners were located in Illinois and committed all of the illegal activity in Illinois. Illinois has a legitimate interest in preventing the commission of fraudulent acts within its territorial jurisdiction, and insuring that such acts are not profitable. It may apply its law irrespective of where the consumers were located.

Petitioners' argument that depriving them of ill-gotten gains in a civil action is unconstitutional is frivolous. The use of civil proceedings to force lawbreakers to account for ill-gotten gains is commonplace and constitutional.

ARGUMENT

I.

ILLINOIS' ADOPTION OF "FLUID RECOVERY" TO INSURE THE DISGORGEMENT OF ILL-GOTTEN GAINS RAISES NO SIGNIFICANT FEDERAL CONSTITUTIONAL QUESTION.

Petitioners substantially misstate the decision of the Illinois Appellate Court. When properly analyzed, it is clear that the decision of the Illinois courts to force the disgorgement of ill-gotten gains derived from consumer protection violations through the mechanism of "fluid recovery" is well within the competence of a State to provide appropriate remedies for fraudulent behavior.

At the outset, it is important to note that, contrary to Petitioners' argument, the Illinois Appellate Court did not decide that "fluid recovery" is appropriate under RICO or any other federal statute. The Appellate Court's opinion was based on the Illinois Consumer Fraud and Deceptive Business Practices Act. As Petitioners concede in a footnote (p. 20, n.5), the Appellate Court held that "fluid recovery is available in at least the claim brought under the Consumer Fraud Act." It said nothing about the other claims.

It is quite possible that the question of whether fluid recovery is available under other state or federal claims will be of no significance in the litigation. For example, if a judgment should be entered in favor of the class under the Consumer Fraud Act claim that is as large as could be recovered under any other claim, or which exceeds the Petitioners' assets, the question of whether fluid recovery is permissible under any other theory will not affect anyone's rights. Both for this reason, and because there has been no decision of any Illinois court of review on the availability of fluid recovery under any

other claim, the Court should limit consideration of the Petition for Certiorari to the question actually addressed below – whether the use of fluid recovery under the Illinois Consumer Fraud Act is unconstitutional.

When considered in this context, it is clear that the use of 'fluid recovery' raises no significant federal question. "Fluid recovery" refers to the fact that it is much easier to determine the financial impact of mass wrongs, such as those involved in this case, on an aggregate basis than on an individual basis. That is, while it may be difficult to document how much bogus "orange juice" particular class members purchased, it is not difficult to document how much adulterated orange juice was produced or how much money the defendants made through this misconduct.

As specifically set forth in the indictment, and as was repeated in the complaint, evidence exists showing how many tons or thousands of gallons of evaporator waste water, beet sugar, and other adulterants defendants purchased during specific periods of time. Production records show how much orange juice was produced during the same periods of time. Former employees will testify that the adulterants went into the orange juice. Thus, by comparing the proofs relating to the acquisition of adulterants to the production records, it is relatively simple to determine the average extent of adulteration during specified periods. Sales records, showing how much defendants received for the concoction sold as "orange juice," also exist; hence, it is possible to determine how much defendants made through their illegal activities, or how much they saved by comparing the cost of the adulterated materials to the cost of the ingredients of orange juice.

"Fluid recovery" addresses the difficulty in determining which class members are entitled to receive the damages computed in the foregoing manner. Once the gross damages are computed, class members can file proofs of claim setting forth their purchases of the affected orange juice products and providing any documentation of the purchases that was retained (such as several of the named plaintiffs kept). If the claims do not exhaust the total recovery, the balance can be placed in a fund for the purpose of reducing prices on the affected orange juice products.

"Fluid recovery" is a mechanism for preventing wrongdoers from profiting from the fact that their victims are numerous. It involves the assessment of damages suffered by the class as a whole followed by its distribution in the manner most likely to result in benefit to the injured population. The trial court in this case described "fluid recovery" as "various mechanisms involving the assessment of damages to the class as a whole followed by its distribution in the manner most likely to result in benefit to the injured population." Similarly, in *Simer v. Rios*, 661 F.2d 655, 675 (7th Cir. 1981), the Court of Appeals described fluid recovery as one in which "the money is either distributed through a market system in the way of reduced charges or is used to fund a project which will likely benefit the members of the class."

The Illinois courts in effect determined that the "any other relief which the court deems proper" referred to in §10a of the Illinois Consumer Fraud Act includes an order requiring disgorgement of the ill-gotten gains from a consumer protection violation through the mechanism of "fluid recovery." As so construed, §10a is perfectly consistent with due process.

There is no due process objection to a statute which (expressly or by construction) empowers the courts of a state, upon proof that a defendant profited from illegal behavior, to determine the amount of the ill-gotten gains and enter judgment against the defendant in that amount. *Substantive* due process is satisfied as long as the statutory remedy is a rational means to accomplish a proper purpose. Preventing fraud is a proper purpose, and requiring a wrongdoer to turn over the profits from fraud is a rational means of accomplishing it.

Petitioners' *procedural* due process rights are satisfied if the procedures used to determine the amount of the ill-gotten gains are fair. Here, the same legal procedures that Illinois uses to adjudicate civil actions generally will be employed. Respondents will have to prove, by a preponderance of competent evidence, the amount of Petitioners' ill-gotten gains. Petitioners will be entitled to conduct discovery, cross-examine, present evidence, and otherwise defend themselves. There is nothing in the record that even suggests that any unfair procedures will be used.

Petitioners argue that a state cannot force them to disgorge their ill-gotten gains unless the individuals from whom the gains were obtained can be precisely identified. Petitioners also seem to find some constitutional infirmity in allowing suit to be brought by a consumer. There is no basis for their arguments.

Assume that the state of Illinois provided that instead of distributing the ill-gotten gains to consumers, the money should be placed in the state treasury. There are in fact numerous state and federal statutes which authorize forfeiture to the state of the profits of illegal activity. Comprehensive Drug Abuse Prevention and Control Act

of 1970, 21 U.S.C. §§484, 853, 881 *et seq.*; Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1963; Bank Secrecy Act, 31 U.S.C. §5317; Illinois Controlled Substances Act, *Ill.Rev.Stats.*, ch. 56-1/2, ¶1505; Wisc. Stats., §§973.075 *et seq.* These statutes are not *per se* unconstitutional. *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 236-37 (1972).

The identity of the persons authorized to bring suit raises no constitutional questions. At one time in our history, it was common to allow any person to bring suit as an "informer" to recover the proceeds of certain types of illegal activity. The False Claims Act, 31 U.S.C. §3729 *et seq.*, still provides for such a remedy in the case of frauds injuring the United States. This Court has rejected constitutional attacks on the False Claims Act. *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943); *United States ex rel. Ostrager v. New Orleans Chapter, Associated General Contractors of America*, 317 U.S. 562 (1943). If it is constitutional to permit any person with private knowledge of the matter to bring suit to compel the disgorgement of money obtained through fraud from the United States, it is difficult to see why it is unconstitutional for Illinois to permit any person damaged by a consumer protection violation to bring suit to compel the disgorgement of money obtained as a result of such a violation.

The situation is no different than when the police arrest a burglar and recover a large quantity of stolen property. The authorities attempt to return such of the property as can be identified to the rightful owner. Property which can be determined to be stolen, but whose owners cannot be identified, is either used for governmental purposes or sold and the proceeds so used. This is consistent with the laws in every state on

the subject of escheat (the constitutionality of which is unquestionable). Due process does not require that stolen property be returned to the thief, or that multiple hearings be held to determine if the property is in fact stolen when a single, overall hearing can determine this matter adequately because it is patently obvious that the burglar did not legitimately acquire 120 VCRs and stereos with the serial numbers filed off. Indeed, given the nature of the proof and the reasonable inferences to be drawn, a finding that all 120 items were stolen could be supported without calling any putative owners.

The present situation is no different. Petitioners have a due process right to an accurate determination of their guilt and an accurate determination of the amount of their ill-gotten gains. They do not have a right to keep their ill-gotten gains as a reward for devising a mechanism for defrauding the public that makes it difficult to return them to the injured individuals. Whether the ill-gotten gains are escheated or forfeited to the state, or distributed through a fluid recovery mechanism, is not something about which the Petitioners have any right be concerned about.

The class members who purchased the adulterated "orange juice" have due process rights with respect to the distribution of the proceeds. However, "fluid recovery" is perfectly consistent with those rights. (In addition, Petitioners would not have standing to complain that the rights of their victims are being infringed.) As long as the best notice practicable under the circumstances is given to the class members who might be entitled to file claims, and the class members are given a fair opportunity to claim their share of the ill-gotten gains, the class members' due process rights are satisfied.

In *Bruno v. Superior Court*, 127 Cal.App.3d 120, 179 Cal.Rptr. 342 (1981), the California courts considered and rejected the "due process" arguments advanced by Petitioners. The wrong in *Bruno* was quite similar to that in this case – artificially inflating the price of milk in violation of the state antitrust laws. The complaint requested that the aggregate overcharge be calculated from defendants' records, that individual purchasers be permitted to present claims, and that to the extent the damages collected were not exhausted by the claims presented, that the balance be used to subsidize a lowering of milk prices in the area affected by the violation. The appellate court reversed the lower court's order striking this prayer for relief on the ground that "fluid recovery" was unconstitutional or legally impermissible:

> While compensation of injured persons is a primary goal, class actions also serve the important purpose, when individual lawsuits are not feasible, of removing ill-gotten gains from the hands of those engaged in unlawful practices. [citations] Absent the use of fluid class recovery, some class actions, those were proof of individual claims is impractical, would neither compensate nor deter, for to allow the defendant to insist upon proof of individual claims will enable it to benefit from the cumbersome nature of legal proceedings and the lack of sophistication and indolence of the consumer, and will reward his foresight in stealing from the multitude in small amounts. (179 Cal.Rptr. at 345-46)

Turning to the same constitutional arguments made by Petitioners, the court held:

> A class action which affords due process of law to the defendant through the time when the amount of his liability is calculated cannot suddenly deprive him of his constitutional rights because of the way

> the damages are distributed. Where damages have been fairly and legally removed from his possession, a defendant's due process rights have been fully vindicated. [citation] Only the class members will have due process rights jeopardized when damages are distributed by fluid class recovery, but those rights can be protected by notice and claim procedures that give class members an adequate opportunity to obtain their individual shares before the residue is distributed through a fluid recovery procedure. (179 Cal.Rptr. at 346-47)

Moreover, if one starts with the premise that in the absence of "fluid recovery" the aggrieved individuals will have *no* recovery, as opposed to the premise that each aggrieved individual has a very theoretical right to full damages, the aggrieved individuals are not deprived of anything. *Bruno v. Superior Court, supra,* 179 Cal.Rptr. at 349. Thus, "the substantive rights of class members are not altered by the fluid recovery. By responding to notice and submitting a claim, each member may receive his [applicable] damages just as if he had brought an individual action." Note, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin,* 87 Harv.L.Rev. 426, 449 (1973).

Other courts have also found that "fluid recovery" is constitutionally unobjectionable. *Simer v. Rios,* 661 F.2d 665, 675 (7th Cir. 1981); *Hogya v. Superior Court,* 75 Cal.App.3d 122, 142 Cal.Rptr. 325 (1977) (fluid recovery authorized where defendant sold misgraded meat to the public); *West Virginia v. Chas. Pfizer & Co.,* 314 F.Supp. 710 (S.D.N.Y. 1970), *aff'd,* 440 F.2d 1079 (2d Cir.), *cert. denied,* 404 U.S. 871 (1971);[1] *Bebchick*

[1]This was the antibiotics antitrust case. The defendants made a universal settlement of their libaility for antitrust violations

[footnote continued]

v. Public Utilities Commission, 318 F.2d 187 (D.C. Cir. 1963); *In re Folding Carton Antitrust Litigation*, 744 F.2d 1252, 1254 (7th Cir. 1984); *Daar v. Yellow Cab Co.*, 67 Cal.2d 695, 63 Cal.Rptr. 724, 433 P.2d 732, 746 (1967);[2] *Cicelski v. Sears, Roebuck & Co.*, 132 Mich.App. 298, 348 N.W.2d 685 (1984).

Petitioners cite early cases disapproving of "fluid recovery" under Rule 23 of the Federal Rules of Civil Procedure. Most of these cases did not state any reasons for doing so. For example, in *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1018 (2d Cir. 1973), merely stated in conclusory terms that "fluid recovery" violated due process; there was a strong dissent. Similarly, *Windham v. American Brands, Inc.*, 565 F.2d 59, 72 (4th Cir. 1977), another divided decision, merely parrots *Eisen*'s conclusion that "fluid recovery" was "illegal, inadmissible as a solution of the manageability problems of class actions

---

over a period of ten years by depositing $120 million, to which various groups of claimants within the chain of distribution claimed entitlement. A group of pharmacists objected to any distribution to consumers on the ground, *inter alia*, that the consumers could not prove their purchases. The court denied the objection, allowed consumers to simply file unsupported proofs of claim, and ordered that any funds not claimed in this manner be paid to the states in which the consumers resided. While *Antibiotics* did involve a settlement, a group of wholesale and retail pharmacists objected to any payment to the consumers. Furthermore, the objections to fluid recovery – such as that it deprives the class members of due process of law – would compel its rejection even in the context of a settlement.

[2]See the discussion of the later history of the *Daar* case in Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 Mich. L. Rev. 338, 366 n. 186 (1971). The litigation was ultimately terminated by a settlement in which the proceeds were used to create a fund to benefit the injured population (taxi riders) through fare reductions.

and wholly improper." In neither case was any explanation furnished.

Those courts which have carefully analyzed the propriety of "fluid recovery" – the Seventh Circuit, at least one other federal court of appeal, and the California courts – have expressly sanctioned it. A number of commentators also find no merit to the "constitutional" objections to "fluid recovery." For example, *Developments in the Law – Class Actions*, 89 Harv.L.Rev. 1318, 1524-25 (1976), states:

> The nature of the due process argument is not clear. Because of the constraints of substantive law, class-wide calculation of damages would be inappropriate where the class opponent has defenses that he could assert against class members on an individual basis. In the absence of such necessarily individualized inquiries, however, the class opponent hardly seems prejudiced by being restricted to only one hearing on common issues. Even though the calculations of damages might involve issues on which a hearing would ordinarily be required by due process, it has never been thought that due process required multiple hearings where there was one full and fair adjudication of the merits.

Similarly, another commentator wrote:

> It is difficult to see how the use of this residue [of unclaimed damages] to lower the future [prices of the commodity or service that was the subject of the overcharge] either modifies defendant[s'] rights or enlarges the rights of the class members. If the defendants' liability has been established, and assuming that res judicata will bar duplicative recovery, total damages under the fluid recovery will be identical to what they would be were each injured class member to come forth and prove his damages.

The defendants' rights will thus not be adversely affected.

Note, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin, supra,* 87 Harv.L.Rev. 426, 449 (1973). *See also, Cicelski v. Sears, Roebuck & Co., supra,* 348 N.W.2d at 690 ("*Eisen* does not convince us of the existence of an inherent constitutional defect in the fluid recovery format").

In short, the due process clause no more prohibits the use of "fluid recovery" to dispose of unclaimed ill-gotten gains than it prohibits the escheat of forgotten bank balances, undistributable inheritances, or unreturnable stolen property.

II.

NOTHING IN THE APPELLATE COURT'S OPINION SUGGESTS THAT THE BEST NOTICE PRACTICABLE WILL NOT BE GIVEN TO THE CLASS.

Petitioners next contend that Illinois cannot apply its proposition that class members will be deprived of notice. There is no basis for the assumption. Petitioners cite nothing in the record authorizing notice to be dispensed with. Indeed, all they state (p. 9) is that "The Illinois Appellate Court approved the use of fluid recovery to assess damages to the class as a whole, without making any provision for adequate notice to all class members prior to an adjudication on the merits."

The Illinois class action statute authorizes the trial court to "order such notice that it deems necessary to protect the interests of the class and the parties." *Ill.Rev.Stats.*, ch. 110, ¶2-803. The Supreme Court of the state has construed ¶2-803 to be mandatory in any case

where due process requires notice. *Teachers Ins. & Ann. Ass'n v. Frank*, 71 Ill.2d 583, 376 N.E.2d 1377 (1978).

Nothing in this record shows that ¶2-803 or the requirements of due process will not be complied with. The matter was simply not yet addressed by either the trial court or the Appellate Court. Petitioners in effect ask this Court to issue an advisory opinion as to what is required, without giving the trial and appellate courts of Illinois a chance to address the matter. Their request shows disrespect for the competence of the state courts.

III.
ILLINOIS CAN CONSTITUTIONALLY APPLY ITS CONSUMER FRAUD ACT TO PETITIONERS' CONDUCT.

Petitioners next contend that Illinois cannot apply its Consumer Fraud Act to the claims of persons who do not reside in Illinois. There is no basis for the argument.

Illinois can apply its law to the entire controversy if Illinois has "a significant contact or a significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981); *Phillips Petroleum Co v. Shutts*, 472 U.S. 797, 811-12 (1985).

The Illinois Supreme Court has held that the Illinois Consumer Fraud and Deceptive Business Practices Act applies to a scheme by an Illinois business to engage in conduct within the territorial jurisdiction of Illinois that defrauds consumers located in other states. In *Martin v. Heinold Commodities*, 117 Ill.2d 772, 510 N.E.2d 840 (1987), a class action was brought against an Illinois business by an Oklahoma resident, suing on behalf of a nationwide class and alleging breach of fiduciary duty

and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. (510 N.E.2d at 841) The complaint alleged that the defendant engaged in unfair and deceptive practices in connection with futures transactions. The Court held that Illinois law could be applied to all members of the class because Illinois had a substantial interest in seeing that companies headquartered in the state behaved themselves properly:

> [W]e conclude that the substantive law of Illinois can be applied to resolve the factual issue common to the class.
>
> The Supreme Court recently addressed the question of which State's substantive law governs resolution of common factual issues presented in a multistate class-action litigation. The court held that the substantive law of the forum State could be applied, consistent with the requirements of procedural due process, where the forum State has "significant contact or aggregation of contacts to the claims asserted by each member of the plaintiff class, contacts creating state interests . . . ensuring that the choice of its law is not arbitrary or unfair." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985). . . .
>
> Applying the *Phillips Petroleum* standard to the instant case, it is apparent that Illinois substantive law can be applied to resolve the underlying common factual dispute. Here each member of the plaintiff class asserts the same breach of defendant's fiduciary duty with regard to the same nondisclosure of the same fact. This common allegation implicates the legitimate interests of the State of Illinois in insuring that persons and entities within its jurisdiction, insofar as they undertake to acts as agents, do so in accordance with its law. In this connection, we observe that defendant's principal place of business is Illinois and that this fact was

> made manifest to each member of the plaintiff class in the following ways: . . . . On these facts, there can be no doubt that the claim of each member of the plaintiff class implicates the legitimate interests of Illinois in applying its law to adjudicate a dispute involving a business principally situated in its jurisdiction and which, by its own efforts, has insistently has sought to avail itself of both the courts and the laws of the forum State. (510 N.E.2d at 847)

The decision of the Appellate Court in this case is but one of numerous decisions applying the consumer protection law of State A to consumer frauds that injure persons in other states. *Fry v. UAL Corp.*, 136 F.R.D. 626, 637 (N.D.Ill. 1991) (court applied Illinois Consumer Fraud Act to conduct by Illinois business directed against persons in other states); *Cange v. Stotler & Co.*, 913 F.2d 1204, 1210 (7th Cir. 1990) (transaction between Chicago futures broker and out-of-state investor within the territorial scope of Consumer Fraud Act); *Brown v. Market Development, Inc.*, 41 Ohio Misc. 57, 322 N.E.2d 367, 369 (1974) (Ohio consumer protection statute "is intended to prohibit (and to provide civil remedies to enforce the prohibition of) deceptive and unconscionable acts and practices by Ohio suppliers in connection with consumer transactions, irrespective of the location of the consumer, whether within or without Ohio"); *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 667 P.2d 1304 (1983) (state could bring action under the Arizona consumer protection, securities and racketeering laws against persons who set up shop in that state and swindled nonresidents because the state has both a legitimate interest and "a moral imperative" to act under such circumstances); *Kugler v. Haitian Tours, Inc.*, 120 N.J.Super.

260, 293 A.2d 706 (1972) (New Jersey consumer protection statute "prohibits unlawful practices in New Jersey without limitation as to the place of residence of the persons imposed upon"); *In re DeFelice*, 77 B.R. 376 (Bkcy., D.Conn 1987) ("New York's quasi-sovereign interest is served whenever the perpetrators of consumer fraud within its borders are brought to justice regardless of whether their victims happen to be citizens"); *People v. Camera Warehouse, Inc.*, 301 Misc.2d 498, 496 N.Y.S.-2d 659, 660 (1985) ("a state is damaged if its citizens are permitted to engage in fraudulent practices even though those parties damaged are nonresidents of the State").

In the closely analogous context of state "Blue Sky" laws, courts hold that a defrauded securities purchaser has remedies under both the law of the state where defendant engaged in the fraudulent conduct and the law of the state where the purchaser received the fraudulent security. *Barnebey v. E.F. Hutton & Co.*, 715 F.Supp. 1512, 1533-36 (M.D.Fla. 1989); *Rio Grande Oil Co. v. State*, 539 S.W.2d 917 (Tex.Civ.App. 1976) (affirming seizure of assets of purveyors of fraudulent securities who operated out of Texas, but swindled only persons in other states); *Simms Investment Co. v. E.F. Hutton & Co.*, 699 F.Supp. 543, 545-46 (M.D.N.C. 1988); *Lintz v. Carey Manor Ltd.*, 613 F.Supp. 543, 551 (W.D.Va. 1985) ("It cannot be disputed that Virginia has a legitimate interest in applying its securities laws to operations conducted within the state, even if aimed at non-residents. [citations] And if the General Assembly chooses to regulate these transactions through the imposition of statutory civil liability in addition to criminal liability, it is free to do so); *Johnson-Bowles Co. v. Division of Securities*, 1991 Utah App. LEXIS 181, at 24-26 (Feb. 19, 1992). In *Barnebey*, the court explained:

> [T]he securities laws of two or more states may be applicable to a single transaction without presenting a conflict of laws question . . . .[O]verlapping state securities laws do not present a classic conflict of laws question . . . .
>
> . . . Many if not all such laws are written to protect purchasers of securities, regardless of the security's origin. Such statutes also seek to render liability on securities issuers whose activities within a given state fail to conform to that state's laws. . . . When a securities transaction crosses state lines and the plaintiffs sue under a blue sky law (as in this case), more than one state's blue sky law may apply. In such situation, the issue is not (as defendants would urge) "of the states whose law might apply, which state law will a conflicts analysis indicate is the 'better' choice of law." Rather, the issue is whether the plaintiffs' allegations show a sufficient nexus between the parties and the particular state law pleaded to justify applying that law. . . . (715 F.Supp. at 1535-36)

A multistate consumer fraud case is really no different, insofar as constitutional limitations on choice of law are concerned, from the classic law school case of a defendant who, while standing in state A, fires a rifle across the state line, killing someone in state B. The malefactor has violated the murder statutes of both states and can constitutionally be prosecuted by either. Clearly, the state from which the gun is fired has a "legitimate interest" in preventing people within its territorial jurisdiction from committing illegal acts.

Similarly, it is clear that in this case Illinois has a legitimate and substantial interest in applying its law. Illinois has a right to compel persons within its territorial jurisdiction to adhere to appropriate standards of conduct and to provide remedies which will effectively deprive

those who fail to conform to those standards of conduct of any profits derived from the noncompliance. Illinois has an interest in protecting law-abiding Illinois businesses from having their good will impaired by the circulation of phony products emanating from Illinois. The precise nature of the harmful objects transmitted from Illinois into other states – bullets, fraudulent prospectuses, or cans of colored water labelled "orange juice" – does not affect the right of Illinois to stop such conduct.

IV.
FLUID RECOVERY IS NOT A CRIMINAL SANCTION.

Petitioners' argument that "the use of fluid recovery impermissibly transforms this civil action into a criminal proceeding by imposing what amounts to criminal sanctions upon Petitioner without providing corresponding criminal procedural safeguards" (p. 13) is frivolous. The use of civil proceedings, with a civil burden of proof, to deprive a defendant of the fruits of unlawful activities or to impose "civil penalties" has been consistently upheld by this Court. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984) (forfeiture of property in civil proceeding); *United States v. Ward*, 448 U.S. 242 (1980) (civil penalties); *Tull v. United States*, 481 U.S. 412 (1987) (civil penalties).

"[M]ost if not all states . . . ha[ve] long recognized the fundamental equitable principle that no one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime." *Simon & Shuster v. Crime Victims Board*, 116 L.Ed.2d 476, 489 (1991). In all states, disgorgement of ill-gotten gains is a remedy commonly imposed on errant fidu-

ciaries. *Restatement 2d, Trusts,* §205 and 206 comment j. On the federal level, it is imposed on persons who infringe copyrights and patents. 17 U.S.C. §504; 35 U.S.C. §284; *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448 (1932).

The use of civil proceedings to effectuate this remedy was noted in *Simon & Shuster* without objection (116 L.Ed.2d at 491). The problem with the New York "Son of Sam" statute was that it violated the First Amendment by discriminating against speech on the basis of content, not that it permitted a non-criminal proceeding to secure disgorgement of the fruits of illegal conduct. And the fact that depriving a defendant of the profits of unlawful conduct has the effect of deterring such conduct does not make the remedy "criminal" any more than punitive damages are "criminal." *Browning Ferris Industries v. Kelco Disposal,* 492 U.S. 257 (1989).

Petitioners' reliance on *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963), is misplaced. *Kennedy* involved a statute which purported to automatically, without any legal proceedings whatever, strip certain draft evaders of their United States citizenship, allowing them to be summarily deported or excluded from the United States. After reviewing the legislative history of the statute and the historic use of exile as a sanction, a divided Court concluded that it imposed a uniquely criminal punishment. The Court noted that exile and imprisonment are referred to in the same sentence of the Magna Carta, along with outlawry (372 U.S. at 186); it is only because exile is such an unusual sanction for illegal behavior in modern times that the question seems to have arisen.[3]

---

[3]Indeed, Justice Brennan's concurrence suggested that exile as a sanction for criminal behavior violated the cruel and unusual punishment clause. (372 U.S. at 188)

CONCLUSION

Stripped of its rhetoric and misstatements, the Petition for Certiorari raises nothing of constitutional concern. The entry of a judgment in a civil action under the Illinois Consumer Fraud and Deceptive Business Practices Act in the amount of the ill-gotten gains secured by a perpetrator of consumer fraud and the distribution of the ill-gotten gains to consumers is constitutionally unobjectionable. The Petition for Certiorari should be denied.

Respectfully submitted,

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July 23, 1992

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_____

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JUL 20 1992

92-92-8

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BODINE'S INC.,

Petitioner,

v.

PAT GORDON, CATHERINE THOMAS, SAM GORDON, and MICHELLE CHROMAN, on behalf of herself and as next friend for her minor children, ADAM CHROMAN and MELISSA CHROMAN, individually and on behalf of all others similarly situated, EDWARD BODEN, SR., EDWARD BODEN, JR. ROGER J. WALSH, JR., DOMINICK'S FINER FOODS, INC., CERTIFIED GROCERS WAREHOUSE, INC., and TERASURE ISLAND FOODS, INC., individually and as representatives of a class; and the KROGER CO.,

Respondents.

Petition for Writ of Certiorari to the Illinois Appellate Court, First Judicial District

BRIEF OF AMICUS CURIAE OF CHICAGO ASSOCIATION OF COMMERCE AND INDUSTRY, ILLINOIS MANUFACTURERS ASSOCIATION, ILLINOIS CHAMBER OF COMMERCE and MID-AMERICA LEGAL FOUNDATION

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Respondents.

MOTION OF CHICAGO ASSOCIATION OF COMMERCE AND INDUSTRY, ILLINOIS MANUFACTURERS ASSOCIATION, ILLINOIS CHAMBER OF COMMERCE, and MID-AMERICA LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

The Illinois Chamber of Commerce, the Chicago Association of Commerce and Industry, Illinois Manufacturers Association, and the Mid-America Legal Foundation join in requesting this Court grant leave to file the attached brief *Amici Curiae* in support of a Petition for Certiorari filed by defendants Bodine's, Inc.

The four *Amici* are greatly concerned about the economic welfare of the State of Illinois and the Midwest region. These organizations urge this honorable Court to grant appellant's

Petition for Leave to Appeal, as plaintiffs in this matter are seeking to create new and expensive class action law termed "fluid recovery."

The defendants in this case sold an orange juice blend which was mislabeled as 100% pure orange juice. Plaintiffs seek to punish the defendant for that misrepresentation, as the juice contained some additional ingredients.

Plaintiffs have no plausible plan to reimburse or even identify the thousands or perhaps millions of consumers who may have purchased the product. Instead, several named plaintiffs are serving as examples of the class as a whole. The named plaintiffs suffered somewhere between about 30¢ and $2 each in damages during the mid-1980's. They calculate their loss as the difference between what they paid for the product and the actual value of the juice blend.

Additional members of the "class" are not identifiable. Plaintiffs do not intend to notify them of this action either by mail or by publication. Under "fluid recovery," members of the class are not expected to make individual claims or receive compensation.

Under a traditional class action, any attempt to notify thousands or millions of persons for a 30¢ claim would be ludicrous, as the cost of administration would far outweigh the recovery to the class members. No one seriously expects a crowd of claimants to flood the courts with grocery store receipts, willing to testify they bought this brand of juice years ago. No claimant in his right mind would go to that trouble for a judgment which will probably amount to less than one dollar, depending on how much juice he bought.

Plaintiffs intend to overcome this obstacle by introducing "fluid recovery" to Illinois law. Through the use of statistical estimates and marketing data, plaintiffs hope to ignore their nominal losses and concentrate on possible unjust enrichment to

the defendants. Plaintiffs plan to figure damages based on the manufacturing costs of an orange juice drink as compared with 100% juice.

If "fluid recovery" is allowed here, this case potentially could generate a huge award since a jury, persuaded by evidence of fraud, may apply punitive damages.

But what will happen to the judgment awarded in this case? Who gets the money when only a handful of plaintiffs in the class have been found? Again, plaintiffs intend to apply the "fluid recovery" approach. A massive class action trial will be conducted in the absence of the class members. A substitute group is to receive the money in a symbolic gesture. Plaintiffs say that after paying their attorney fees, the proceeds of this judgment would go to lower the price of this orange juice brand for the benefit of *future* juice drinkers.

Amici herein have an interest in this case because they fear plaintiffs' "fluid recovery" plan will completely reverse settled class action law in Illinois, while imposing tremendous economic hardship on businesses and consumers in this State and throughout the country.

The "fluid recovery" plan proposed by plaintiffs and upheld by the Appellate Court makes no effort to find and compensate any flesh-and-blood plaintiffs for any actual injuries. Instead, plaintiffs would introduce court-sponsored market controls on orange juice prices, which will cause a loss of sales to competing juice producers. Thus "fluid recovery" would harm the juice market while doing nothing for the affected consumers of identified as members of the "class."

Apparently, the only "class" of persons certain to benefit from this expensive class action suit will be plaintiffs' counsel.

With rising costs of litigation impeding American business and contributing to our current recession, this novel "fluid recovery" idea will cause a great deal of additional damage to the economy in Illinois and elsewhere.

Amici herein fully support accurate labels on all consumer products sold in this State and elsewhere. However, "fluid recovery" will do nothing to further consumer rights, and will simply add to the litigation explosion by allowing class actions without the necessity of any real, damaged plaintiffs.

The **Chicago Association of Commerce and Industry** was founded in 1904. Its membership today consists of 2,500 businesses of all sizes and types. It maintains a high profile in the Chicago area with civic and educational activities. It's stated purpose, among other things, is to provide "...One singular voice of business, representing the unique and particular needs of the Chicago area at the local, regional state, and national level."

The members of CACI therefore have a direct interest in the outcome of this matter, and request this Court to allow them to file this brief as *Amicus*.

The **Illinois Chamber of Commerce** was founded in 1929 and today represents over 5,000 members. It is active in all areas which affect business, including the cost of litigation to the business community. Insurance costs for liability, health, and worker's compensation are all affected by the growth of lawsuits in America.

The Illinois Chamber is devoted to protecting the interests of business before government in Springfield and in Washington.

The **Illinois Manufacturers Association** began in 1893, and now has about 4,800 members across the State of Illinois. Many of its members will be affected by the controversy here and have a great interest in the Petitioners' Request for Leave to Appeal. The IMA is involved in a variety of activities which affect the business climate in the state. It is devoted to keeping Illinois manufacturers competitive in the world market, and favors responsible laws and regulations in all areas which impact on manufacturing.

The **Mid-America Legal Foundation** was created in 1975 as a non-profit public interest law firm. Its purpose is to advocate

on behalf of free enterprise in federal and state courts and in administrative tribunals. MALF serves seven Midwestern states: Illinois, Minnesota, Ohio, Indiana, Wisconsin, Iowa, and Michigan, and frequently participates in legal disputes where critical free market principles are threatened.

Therefore, the three organizations all respectfully request leave to file the attached Brief as *Amici Curiae*.

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Dated: July 17, 1992

The Petitioner agreed to allow our Brief as Amici, but the Respondent refused, necessitating this Motion.

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INTRODUCTION AND STATEMENT OF FACTS

This matter arises from mislabeled orange juice produced by defendant Bodine's, Inc. from 1978 to 1985. Allegedly the company added distilled water, corn syrup, grapefruit solids, or other additives, creating a mixture of orange juice and orange drink. The produce was sold as "pure orange juice" and thus not properly labeled.

Plaintiffs claim the company's misconduct allowed it to obtain a greater share of the orange juice market through lower prices.

In 1985, Bodine's, Inc. was sold. The buyers knew nothing of the company's past deeds. The new owners have always produced pure juice products, all accurately labeled.

Following the sale, an investigation was conducted of the prior owners' manufacturing practices. In July, 1989, Defendants Edward Boden, Sr. and Edward Boden, Jr. were charged with selling adulterated food in a multi-count Federal indictment. They were sentenced in the United States District Court for the Northern District of Illinois on February 27, 1990. Edward Boden, Sr. was fined $200,000 and sentenced to two years in prison along with 1,000 hours of community service. His son was fined $200,000 and sentenced to two years probation and 200 hours of community service.

Plaintiffs filed this class action against the Bodens and their former company, Bodine's, Inc., in July 1989. The very day the Bodens were sentenced, plaintiffs filed their third amended complaint in the Circuit Court of Cook County. Mirroring the Federal indictment, plaintiffs allege that Bodine's Inc. sold an orange juice blend mislabelled as "100% pure" orange juice.

Plaintiffs claim they suffered economic loss as consumers of Bodine's products between the years 1978 and 1985. They seek the difference between the 100% pure juice they paid for and the orange drink mixture they received. On behalf of millions of consumers nationwide, plaintiffs claim they are entitled to this differential in value.

Six individuals are named as plaintiffs, all of whom will testify at trial that they purchased this product in varying amounts. They expect their efforts to yield a partial refund in the price they paid for orange juice, depending on the quantity of this product they purchased and consumed.

Because of difficulties identifying, notifying, and compensating the millions of other class members, plaintiffs propose use of "fluid recovery." That doctrine will permit them to proceed with the lawsuit without notifying any other class members.

In calculating the damages, plaintiffs intend to invoke "fluid recovery" to allow them to focus on defendants' unjust enrichment rather than their own nominal losses. They propose a trial to determine the extent of defendants' profits as a result of the wrongful behavior, and to determine what punitive damages should be awarded. Claims are made for RICO, consumer fraud, and violation of various consumer protection statutes.

Plaintiffs expect that a verdict may greatly exceed the needs of six persons seeking partial refunds on orange juice.

The remainder of the fund, considered "fluid," will not be transferred to members of the class. Instead, it is earmarked for some project considered beneficial to orange juice consumers in general--in this case, they intend that Bodine's, Inc. be ordered to reduce its prices until the "fluid" fund is depleted. If that is not possible, the money will go to the State, according to the lower court decision.

The use of "fluid recovery" to sustain an otherwise unmanageable class action suit is justified by the Appellate Court of Illinois on the grounds that defendants' criminal behavior calls for the "disgorging" of defendants' "ill-gotten gains." Plaintiffs have argued that the criminal system is insufficient to deter white collar crime, thus necessitating the use of creative class action lawsuits for the public good.

Before now, "fluid recovery" has been rejected by every Court to consider it, except California. The decision below opens the door in Illinois for class action lawsuits, national in scope, in which members of the "class" will receive no notice of the lawsuit and no compensation.

The many defects in "fluid recovery" are set out below. Amici herein view the price-cut proposal herein as improper tampering with the free market system and a possible violation of anti-trust laws. The Appellate Court upheld "fluid recovery" because it purportedly protects the public, but in fact this system will harm consumers and disrupt the market. In addition, the use of a class action lawsuit in this case will deprive defendants of Due Process.

The only "class" of persons who can benefit from this type of legal innovation will be attorneys bringing these actions.

STATEMENT OF INTEREST OF AMICI CURIAE

The Chicago Association of Commerce and Industry was founded in 1904. Its membership today consists of 2,500 businesses of all sizes and types. It maintains a high profile in the Chicago area with civic and educational activities. Its stated purpose, among other things, is to provide ". . . One singular voice of business, representing the unique and particular needs of the Chicago area at the local, regional, state, and national level."

The Illinois Manufacturers Association was formed in 1893, and now has about 4,800 members across the State of Illinois. Many of its members will be affected by the controversy here and have a great interest in this action. The IMA is involved in a variety of activities which affect the business climate in the state. It is devoted to keeping Illinois manufacturers competitive in the world market, and favors responsible laws and regulations in all areas which impact on manufacturing.

The Illinois Chamber of Commerce was founded in 1929 and today represents over 5,000 members. It is active in all areas which affect business, including the cost of litigation to the business community. Insurance costs for liability, health, and worker's compensation are all affected by the growth of lawsuits in America.

The Mid-America Legal Foundation was created in 1975 as a non-profit public interest law firm. Its purpose is to advocate on behalf of free enterprise in federal and state courts and in administrative tribunals. MALF serves seven Midwestern states: Illinois, Minnesota, Ohio, Indiana, Wisconsin, Iowa, and Michigan, and participates in legal disputes whenever critical free-market principles are threatened.

ARGUMENT

I. "FLUID RECOVERY" VIOLATES CLASS ACTION REQUIREMENTS FOR MANAGEABILITY

Plaintiffs argue forcefully that the "fluid recovery" issue be divorced from any discussion as to whether the class is manageable. Such a distinction is impossible because the only purpose for "fluid recovery" is to overcome the usual obstacles of an unmanageable class action lawsuit.

Existing Illinois law provides for class action lawsuits only where the class is manageable. According to Section 2-801 of the Code of Civil Procedure (Ill. Rev. Stat. ch. 110, par. 2-801 (1989)), a class action may be maintained if: ". . . (3) the representative parties will fairly and adequately protect the interest of the class; and (4) the class action is an appropriate method for the fair and efficient adjudication of the controversy."

Ordinarily, the members of the class must be identifiable. *Hayna v. Arby's*, 99 Ill. App. 3d 700, 425 N.E.2d 1174 (1st Dist. 1981). In addition, the amount of the recovery for each person must be worthwhile, or at least sufficient to cover the administrative costs and other expenses. *Id.*; *Adams v. Jewel*, 63 Ill. 2d 336, 348 N.E.2d 161 (1976).

In the case at bar, plaintiffs may number in the millions. Each individual may be entitled to varying amounts, depending on the quantity of this product he or she purchased and consumed during the time period in question. This case is a classic example of an unmanageable class action lawsuit: millions of persons making varied and individual claims, all with no objective verification possible.

"Fluid recovery" is a device to avoid the usual problems of an unmanageable lawsuit. The plaintiffs have no intent to notify members of the purported "class" beyond those already named as plaintiffs. The judgment will not be based on the losses suffered by injured parties. And finally, the proceeds of the lawsuit will

not be turned over to the plaintiff "class." Instead, the funds are to be used for any symbolic purpose chosen by plaintiffs as suitable under the circumstances.

II. NAMED PLAINTIFFS HEREIN MAKE NO EFFORT TO PROTECT THE INTERESTS OF OTHER CLASS MEMBERS

The Court below summarily found that the named plaintiffs adequately represent the class of past orange juice drinkers who purchased or consumed defendants' product. Apparently the Court was unaware or did not consider the impact of "fluid recovery" on the role of named plaintiffs here.

We agree that named plaintiffs represent the class in the sense that they are *examples* of consumers who purchased the product. But these named plaintiffs clearly are not watchdogs for the rights of the class as a whole. This is apparent as the named plaintiffs have indicated no plans whatsoever to notify other class members of their rights in this action.

It seems the plaintiffs have simply given up on the expediency of expensive mailings or publications on a nation-wide basis where the members of the class are unidentifiable and totally diverse. Furthermore, no sane person would exercise his "rights" to join a lawsuit and testify so as to "recover" an award which may be less than $1, depending on the amount of orange juice he bought or drank during the mid-1980s.

Through "fluid recovery," plaintiffs have solved that problem by eliminating all consideration of the class as a whole. There will be no effort to notify class members of their rights or assist them in making claims. In this manner, named plaintiffs have greatly simplified the process of a class action lawsuit. By giving no notice to members of the affected class, plaintiffs save themselves most of the expenses normally associated with class actions. And the court need not make any provisions for a stampede of claimants seeking recompense for the loss in value of their orange juice.

But the plaintiffs clearly are not "representing" the interests of other members of their class under their proposed "fluid recovery" system. Named plaintiffs are not in fact protecting anybody else's rights; they are merely ornamental, enabling their attorneys to bring the lawsuit.

Such a situation surely is not unique to the case at bar. In any action where "fluid recovery" may be suggested as a convenient device for class action lawsuits, the "class" of injured plaintiffs will be a legal fiction; a dress code required for entry to the class action format.

The entire procedure flies in the face of centuries-old legal traditions. In civil disputes, the courts assume that the named parties have a real interest in the outcome of the case. Mere symbolic gestures are not well suited to tort lawsuits. Here, plaintiffs have expressed a desire to make a point about fraudulent labeling practices and adulteration of food. But they are not doing so in the interests of the class they supposedly represent.

It is important to note that under "fluid recovery," those who are meant to receive the proceeds of this lawsuit are a different group than those who suffered the loss. Allegedly, those who purchased and consumed defendants' product between 1978 and 1985 suffered economic harm and request compensation. But under "fluid recovery," the proceeds of this lawsuit will not go to those individuals. Instead, it will be given to *future* juice drinkers, whom we shall refer to as the "beneficiaries." The lower Court made no mention of this unusual arrangement: under "fluid recovery," the plaintiffs who suffered the loss are not those who will receive the proceeds of the verdict.

Obviously the named plaintiffs in this particular matter are in no position to "represent" (protect) the rights of the beneficiary class. Such a situation is hardly surprising when "fluid recovery" is requested. Where named plaintiffs are unconcerned what use will be made of the proceeds of a lawsuit, it cannot be said that those named plaintiffs are protecting the interests of the plaintiff "class" or the beneficiary "class."

III. "FLUID RECOVERY" WREAKS HAVOC ON THE MARKET AND COULD RAISE TAXES

If named plaintiffs are doing a poor job protecting the rights of the plaintiff class, they are doing a worse job protecting the rights of the "beneficiaries," the future juice drinkers slated to enjoy the fruits of this lawsuit. Supposedly, the verdict against defendants will be used to fund a price cut for defendants' orange juice. This is justified on some sort of equitable grounds, as plaintiffs have expressed they intend to deprive defendants of their "unjust enrichment."

The problem is that the price-cut scheme will not in fact benefit the supposed "beneficiaries." As with most governmental efforts at price control, this one will fail to achieve its desired goal.

First, a price cut by a juice manufacturer will simply result in windfall profits to the distributor. A distributor may have no reason to pass on a price savings to the retail outlets.

Second, the retailers may decide to price defendants' juice at the market rate, despite a price cut from the manufacturer. Lower prices charged by the manufacturer cannot guarantee any savings to the ultimate consumers.

Third, the proposed price cut *will* result in a disruption of the marketplace for juice manufacturers. It is unclear whether such a court-ordered plan might violate some anti-trust laws, but one thing is certain: if defendants undercut their competition, they will gain a larger share of the market. *Other orange juice producers will suffer losses, not necessarily Bodine's, while individual consumers will likely benefit nothing.*

The price-cut plan proposed by plaintiffs as a benefit to future juice drinkers is reminiscent of attempts by Socialist governments to control prices. Such efforts have met with dismal failure. *Amici* herein certainly hope that Illinois Circuit Court judges will refrain from manipulating the market through artificial price controls.

Furthermore, in calculating methods to benefit future orange juice consumers, plaintiffs conveniently ignore the fact that the current owners of Bodine's, Inc. are now subject to significant defense costs as a result of this very lawsuit. It is no secret: directly or indirectly, a company has no choice but to pass on such costs to consumers. **If plaintiffs are serious about assisting orange juice drinkers through lower prices, we suggest they dismiss this lawsuit, thus saving the company huge legal expenses and allowing a real savings to the American public.**

Michigan courts came to exactly the same conclusion. *See Cicelski v. Sears*, 348 N.W.2d 685 (Mich. App. 1984). Plaintiffs in *Cicelski* sought recovery of interest overcharges from a large retailer. The process would have involved refunds to over a million charge customers to reimburse them at perhaps a few pennies per person. In refusing to allow a "fluid recovery" class action lawsuit, the court commented that the plaintiffs themselves would suffer from it in the long run, because the store's costs eventually would show up in higher prices:

> [A court should be] concerned, and legitimately so, that the costs of calculating and distributing individual damage awards could be grossly disproportionate to the size of those awards; ...these costs would ultimately be passed on to defendants' customers.

Cicelski, 348 N.W.2d at 688.

Michigan expressly rejected "fluid recovery" on economic grounds. As reported in *Cicelski*, the trial judge also wrote caustically that "the primary beneficiary of these proceedings would most likely be the attorneys through fees." *Cicelski*, 348 N.W.2d at 689.

In the case at bar, the Illinois Appellate Court adopted the definition of "fluid recovery" provided by *Cicelski*, which defines the unclaimed portion of the damage fund (in this case, about 99 percent of it) as the actual fluid recovery. This money

is to be either distributed through the market in the form of a reduced charge for an item defendants previously overpriced, or it is given to the state to use on a project likely to be of interest to class members. If that is not possible, the state may spend it for general purposes. *Cicelski*, 348 N.W.2d at 689.

As stated above, plaintiffs' simple-minded attempts to engage in market controls will ultimately backfire in the form of higher prices for consumers. If price control is a bad idea, a gift to the state is even worse. No citizen in his right mind would want to prosecute a lawsuit simply to have the money go to the state. Such an arrangement would amount to a court-sponsored tax hike. In effect, that is what plaintiffs in this case actually propose: under the "fluid recovery" doctrine as adopted by the Illinois courts, the bulk of the verdict could very well go to the state. **When money is transferred from the pockets of a citizen to the state treasury, that is effectively a tax.** And a tax by any other name is still a tax.

Since the affected consumers here are from many states, potentially this verdict may go to the federal government. But it is safe to say that few consumers would regard a payment to the IRS as a benefit to themselves.

As it now stands, the Illinois Appellate Court has adopted the above-described system for distributing the damage fund. *Amici* are astounded that use of a verdict for artificial price controls or for a tax hike could be construed as a "benefit" to consumers or to any other class of people.

One suspects that the price-cutting proposal offered here is merely a ruse, an afterthought by plaintiffs. The normal civil justice system assumes that a lawsuit is a means to an end--the verdict being the desired end. But here, the system is turned upside down. The verdict is the means to justify the lawsuit. Incredibly, under "fluid recovery," the lawsuit is seen as an end in itself. For the plaintiffs at bar, it is not important what happens to the money. The goal is to transfer funds in an effort to punish a wrongdoer (or simply to generate legal fees); how the money is used is incidental.

Any scheme to collect nickels and dimes through an unwieldy device like a class action lawsuit ought to raise immediate suspicion. "Fluid recovery" lawsuits attempt to defy basic economic law. But no amount of legal jargon can overcome this simple truth: no one is benefited by a system which costs him $50 to recover 50 cents.

IV. THESE PLAINTIFFS DO NOT, AND CANNOT, REPRESENT THE PUBLIC INTEREST

Plaintiffs claim "fluid recovery" is justified for the public interest. But as champions of the public, these plaintiffs leave a lot to be desired. In listing the actual victims of the alleged orange juice fraud, for example, plaintiffs have conveniently overlooked certain persons who suffered *real harm*:

* *Competitors*. Plaintiffs point out that Bodine's, Inc. added cheaper ingredients to its orange juice, allowing it to obtain a larger market share. Obviously Bodine's was able to undersell the competition, thus gaining an unfair advantage over competing juice producers. Ironically, in an effort to remedy past wrongs, plaintiffs propose the company cut its juice prices *again*.

* *New Owner*. Before he was convicted of any crime, Mr. Boden sold his business to an unsuspecting and innocent buyer. Besides being saddled with a massive class action suit along with tremendous defense costs, the new owner suffered negative publicity among Bodine's distributors and retailers along the chain of sale. Thus the purchaser of Bodine's, Inc. is yet another *victim* of this whole affair.

Strangely, in their zeal to find justice against wrongful labeling and marketing practices, plaintiffs propose this lawsuit for the expressed purpose of punishing one victim–the new owner of Bodine's, Inc.–to compensate for events over which he had no knowledge or control.

V. *"FLUID RECOVERY" AMOUNTS TO A QUASI-CRIMINAL ACTION MASQUERADING AS A CIVIL ACTION*

Make no mistake about it: plaintiffs in this matter seek to open an entirely new frontier in legal thinking through "fluid recovery." Phrases such as "ill-gotten gains" and "disgorgement," familiar terms of equity, are combined with some extraordinary demands for punishment. The result is that plaintiffs have first blurred and then stepped over the line between civil and criminal law.

Arguments by plaintiffs sound distinctly prosecutorial in tone. In advocating for "fluid recovery," plaintiffs discount their role as injured persons seeking compensation. Instead, they intend to compute the damages in accordance with defendants' wrongful conduct. They point to alleged criminal behavior and demand that the court function as a hanging judge.

Counsel for plaintiffs intentionally present themselves in the role of quasi-prosecutor. Note the emphasis they place on the supposed benefit this lawsuit will have on the American public rather than to the individual named plaintiffs or their purported "class." Adding together the juice consumers of the past with the consumers of tomorrow, it is apparent that the "class" which plaintiffs attempt to represent here is indistinguishable from the general public.

Plaintiffs admit their lawsuit is mainly punitive in intent, because the *total money damages being sought are not based on compensation proportionate to plaintiffs' injuries. These plaintiffs are asking for blood.* "Criminal penalties for white-collar offenses are no deterrent," plaintiffs proclaim. Scornful of the conventional sanctions within the criminal justice system (which in this case sent Mr. Boden to prison for two years and fined him and his son over $500,000), plaintiffs discount the significance of incarceration as mere "country club prison." *See* plaintiffs' Brief to the Appellate Court of Illinois, First District, p. 11.

Plaintiffs see the civil court system, through the use of "fluid recovery," as a step *beyond* criminal law. A criminal judge can merely put a prisoner behind bars. To inflict *real* punishment on a wrongdoer, plaintiffs say, make him the target of a class action lawsuit--a fate worse than jail.

That view is echoed in *Eisen v. Carlisle*, 479 F.2d 1005 (2d Cir. 1973), which points out the enormous defense costs associated with class action cases. Those costs ". . . have brought such pressure on defendants as to induce settlements in large amounts as the alternative to complete ruin and disaster, irrespective of the merits of the claim." *Id.* at 1019. The economic pressure on a defendant amounts to "legalized blackmail" in some instances. *Id.* at 1019.

VI. EFFORTS TO DISPENSE CRIMINAL JUSTICE AGAINST CORPORATIONS THROUGH "FLUID RECOVERY" WILL INEVITABLY RESULT IN DUE PROCESS VIOLATIONS

If this were a purely civil lawsuit to compensate identifiable victims for a wrong, it would make sense for the new owner of a business to make good on the loss. It is axiomatic that one who buys an ongoing business also buys its debts and obligations.

It is highly unusual, however, that one who purchases a business is thereby subject to personal criminal liability for the acts of another. Yet through the use of "fluid recovery," plaintiffs attempt to do just that. Plaintiffs emphasize the criminal conduct of Mr. Boden personally as a basis for this unusual "fluid recovery" lawsuit. Plaintiffs themselves urge the use of class action lawsuits, especially "fluid recovery," as a necessary substitute or supplement to criminal charges.

Upon close examination, plaintiffs' expressed desire to punish the defendant will not have the intended result. Though the current Bodine's, Inc. is under new ownership producing a pure, 100% orange juice product, plaintiffs would have this company stand in and atone for the prior owners' criminal acts. In reality, the Bodens themselves will not be affected by the punishment meted out on the buyer of their business. But

punishment is the whole purpose of "fluid recovery," and so somebody must pay. The new owners of Bodine's, Inc. therefore are required to stand in as a symbolic whipping boy for the real wrongdoer. The arrangement apparently will remain satisfactory to plaintiffs, so long as the stand-in defendant remains solvent.

This Court might be tempted to step in and "prosecute" a wrongdoer through a class action lawsuit in some cases where the criminal justice system has failed. However, *Amici* herein suggest such matters be left to the legislative branch. In this instance, the wrongdoers were in fact caught by the system and punished. If plaintiffs are unhappy that the punishment imposed here was insufficient, they should have made their opinions known to the prosecutor and judge at the time of sentencing. It will not do for the plaintiffs to bring a separate action later, a sort of civil Double Jeopardy, where they perceive the sentence to be insufficient.

With modern corporations undergoing almost constant changes in personnel, shareholders, management, and ownership, "fluid recovery" could pose a real threat to the due process rights of corporate citizens. Moreover, if "fluid recovery" is adopted as part of Illinois law, we can expect large numbers of frivolous class action lawsuits to be filed against the business community, as few private individuals can pay the massive awards and settlements of this high-stakes litigation. With the emphasis here on criminal-style *punishment* rather than civil-style *compensation*, no doubt corporations will find themselves paying for the criminal acts of others on a regular basis.

Illinois should not allow private quasi-criminal class actions under the banner of "fluid recovery." Such lawsuits make no provision whatsoever to protect the rights of subsequent shareholders, managers, and others within the corporate community. As plaintiffs correctly point out, a class action lawsuit is perhaps worse punishment than a prison term. Yet plaintiffs would bring down this calamity on any unwitting persons who happen to be associated with the corporation when,

years later, a lawsuit is brought. Such a system is about as fair as placing someone in prison because his neighbor committed a crime.

VII. NOT ALL SOCIAL ILLS ARE AMENABLE TO REPAIR BY THE COURTS

Plaintiffs suffered a real loss when they purchased an orange drink/juice mixture which was mislabeled as pure orange juice. *Amici* herein condemn any corporation which mislabels its products or adulterates food. However deplorable that conduct was, though, the fact remains that the members of the plaintiff "class" suffered more a moral loss than an economic one. It should not be the function of Illinois courts to convert moral losses into economic penalties, especially where the problem already has been addressed legislatively.

Earlier in this century, a book describing conditions in the meat packing industry caused a great public outcry. *The Jungle* by Upton Sinclair helped contribute to creation of the Food and Drug Administration. Americans have long viewed food adulteration as unacceptable, but the issue has been addressed by the legislature. Illinois courts would be stepping beyond their authority to duplicate the FDA's function solely because a class action suit has been filed.

Amici herein are deeply disturbed by the Due Process and other implications of "fluid recovery" in Illinois. As an alternative to conventional criminal justice, it is a poor substitute. The tort system is not an appropriate format for dispensation of criminal justice, as it lacks the safeguards which can be expected from conventional legal and administrative penalties.

Furthermore, plaintiffs in a class action lawsuit such as this cannot be expected to sacrifice their own interests in favor of the public good. This court should not lose sight of the fact that the plaintiffs represent their own economic self-interest, pure and simple. Within the framework of a civil tort system, such economic self-interest is perfectly acceptable. But as champions

of the broad public good, a handful of past orange juice consumers can hardly substitute for the legislative and executive branches of our government.

Amici herein are not alone preferring legislative solutions to broad social ills. No matter how well-intentioned, class action lawsuits by their nature have certain limitations in terms of the social benefits which can be obtained:

> It seems doubtful that [fluid recovery] can be expected to be effective where there are millions of members of the class, without some infringement of constitutional requirements. The problem is really one for solution by the Congress. Numerous administrative agencies protect consumers in various ways. It should, we think, be possible for the Congress to create some public body to do justice in the matter of consumers' claims in such fashion as to afford compensation to the injured consumer. *If penalties are to be imposed upon wrongdoers, at least let the Congress decide how the money is to be spent.*

Eisen, 479 F.2d at 1019 (emphasis added).

VIII. PROLIFERATION OF MASS LITIGATION DAMAGES THE ECONOMY

A dangerous trend has appeared in the law, as ever-larger and more massive litigation proliferates. Peter Huber sums it up very well in his book, *Liability, The Legal Revolution And Its Consequences*, (Basic Books, Inc.) (1988):

> Today no case is too unwieldy for a court, no exposure too low, no injury too uncertain, no class of actual or potential victims too large, no list of defendants too long. A legal system once concerned with individual justice is now a principal center of social engineering.

> ...Matters of public policy, once considered to be so broad-ranging that only the political branches of government could address them, are now routinely squeezed into the mold of a lawsuit....

Huber, *supra*, at 82-83.

Even when used properly as a tool for dispute resolution, the tort system is notoriously cumbersome and inefficient.

According to the 1990-91 Annual Report of the Institute for Civil Justice (the "Rand Report"), the processing costs for civil cases in the U.S. has risen to an estimated $2 billion, not counting what the litigants themselves pay. Rand Report, p. 50.

The system is overloaded, partly as a result of creative theories such as seen in the case at bar. The result is enormous inefficiency, so that only a paltry sum reaches the pockets of injured persons as compared with the resources spent on the litigation process itself. According to the Rand Report, plaintiffs receive an average of only 46 percent of the total expenditures on a civil case. *Id.* at p. 51. The percentage worsens with mass litigation such as asbestos lawsuits, where the plaintiff's portion drops to only about 39 percent. *Id.* at p. 55. Even those estimates may be overly optimistic. According to Huber, plaintiffs only receive about a third of the total expenditure in a typical lawsuit. Huber, *supra*, at 151.

The effect of all this on our nation's industry is devastating. Crippled by insurance costs, American business is hampered as compared with foreign producers. Coincidentally, the U.S. population currently includes about three attorneys per 1,000 residents, compared with only 0.8 per 1,000 in Germany and 0.5 in France. The American Bar Association estimates one million lawyers will be available in the U.S. by the year 2000.

Manufacturers now avoid new or innovative products as a reaction to the current liability system. Class action lawsuits are among the worst offenders, causing shotgun-wedding type settlements, the costs being passed on to consumers.

The problem is analyzed well by Theodore B. Olson, a noted author, in his article *The Social Consequences of Punitive Damages*, published by the National Legal Center in the Public Interest (August 1990):

> Ultimately, we have added immense costs to our productivity in order to pay for an army of lawyers, warehouses full of pleadings, and platoons of court attaches. These consequences affect our capacity to compete as a society when we can least afford it. Someone observed that if we are to compete with the Japanese we must export one product to Japan: lawyers.

Olson, *supra*, at 60.

This type of anti-lawyer sentiment should come as no surprise as Americans come to realize that the cost of living must rise as a greater share of our gross national product is consumed by our litigation system. The National Association of Manufacturers estimates as much as 10 percent of our GNP is spent on litigation. "Fluid recovery" promises to increase these costs further still.

More importantly, a massive, unwieldy case such as the one at bar threatens to push aside other, more valid cases--ones with real plaintiffs who have suffered actual injury.

IX. IF ILLINOIS ENDORSES "FLUID RECOVERY," IT WILL BECOME A MAGNET FOR FRIVOLOUS AND BURDENSOME CLASS ACTION LAWSUITS

So far, California is the only state, other than Illinois, which has allowed a "fluid recovery" class action lawsuit. *Darr v. Yellow Cab Co.*, 433 P.2d 732 (Cal. 1976), and *Bruno v. Superior Court*, 179 Cal. Rptr. 342 (1981). There is some possibility the California courts have seen the error of their ways. Though not specifically reversing themselves, California courts have found reason to distinguish and limit future growth of the system. *Collins v. Safeway Stores*, 231 Cal. Rptr. 638 (1986)

The Illinois Appellate Court justified the use of "fluid recovery" in this case based on *Cicelski*, 348 N.W.2d 685; *Simer v. Rios*, 661 F.2d 655 (7th Cir. 1981). But the *Cicelski* court expressly rejected the "fluid recovery" doctrine.

Simer, likewise, is an indictment of the "fluid recovery" doctrine. Despite efforts in that case to settle, the Seventh Circuit refused to endorse a settlement which provided for no notice to members of the class. Alluding to the "legalized blackmail" problem mentioned in *Eisen*, the *Simer* court worried about plaintiffs who might "append the class claim merely to strengthen their bargaining power in settlement discussions." *Simer*, 661 F.2d at 665.

X. *THIS ACTION, BY UTILIZING "FLUID RECOVERY," CONTRIBUTES TO THE POOR PUBLIC IMAGE OF THE LEGAL PROFESSION*

The American legal profession has suffered ridicule both here and abroad because of cases such as this, where someone goes to court over a 39-cent can of frozen orange juice.

A case exactly like the one at bar was splashed across the front page of the *Wall Street Journal* recently, exposing the seamy underside of a class action lawsuit against a musical rock group. *See The Mouthpieces: Class Action Lawyers Brawl Over Big Fees In Milli Vanilli Fraud*, Wall St. J., Oct. 24, 1991, at A1.

According to the *Journal* article, one judge detected a "strong-odor" from the attorneys, as they apparently had recruited their clients solely to generate outrageous legal fees. The musical group in that case had committed fraud by selling their "Girl You Know Its True" album as their own work when in fact other singers' voices were used. The plaintiffs in that case did not claim any serious damages from the fraud; a situation startlingly like the case at bar.

Amici herein believe this very case could potentially generate negative publicity for the legal profession, as a casual observer might wonder whether the lawyers are simply exploiting trivial injuries to make a buck. That reasoning was reflected in the

Cicelski decision, which denied an award of attorney fees since the lawsuit provided no benefit to the plaintiff class. *Cicelski*, 348 N.W.2d at 692.

CONCLUSION

Plaintiffs would have this Court discard centuries of jurisprudence by adopting an innovation called "fluid recovery." If this type of lawsuit is allowed to go forward, class action lawsuits will be possible with fictional plaintiffs, phantom beneficiaries, and even substitute defendants.

With "fluid recovery," it is the symbolism that counts, not the reality. Absent plaintiffs, absent defendants, and absent recipients of the proceeds, the new and creative class action can proceed nevertheless if the decision by the Court below is allowed to stand.

Amici therefore urge this Court to grant Defendants' Petition for Leave to Appeal in this matter, and reverse the lower court ruling.

Respectfully submitted,

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Dated: July 17, 1992

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OFFICE OF

No. 92-008

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

BODINE'S, INC.,

Petitioner,

v.

PAT GORDON, CATHERINE THOMAS, SAM GORDON, MICHELLE CHROMAN, ADAM CHROMAN, MELISSA CHROMAN; EDWARD BODEN, SR. and EDWARD BODEN, JR.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST JUDICIAL DISTRICT

RESPONDENTS' OBJECTIONS TO MOTION FOR LEAVE TO FILE AMICUS BRIEF

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PAT GORDON, CATHERINE THOMAS, SAM GORDON, MICHELLE CHROMAN, ADAM CHROMAN, MELISSA CHROMAN; EDWARD BODEN, SR. and EDWARD BODEN, JR.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST JUDICIAL DISTRICT

RESPONDENTS' OBJECTIONS TO MOTION FOR LEAVE TO FILE AMICUS BRIEF

To the Chief Justice and Associate Justices of the Supreme Court of the United States

Respondents Pat Gordon, Catherine Thomas, Sam Gordon, Michelle Chroman, Adam Chroman, and Melissa Chromas respectfully object to the motion of the Mid-America Legal Foundation et al. for leave to file brief *amicus curiae.*

The "motion" and proposed amicus brief do not comply with Rule 37 of this Court. They do not "bring[ ] relevant matter to the attention of the Court that has not already been brought to its attention by the parties."

Examination of the "amicus" brief discloses that it is nothing more than an outrageous attempt to place before the Court "facts" which are unsupported by anything in the record and are incorrect. In many instances, the record is affirmatively misrepresented.

To illustrate:

1. Page 2 of the "motion" states that "[t]he defendants in this case sold an orange juice blend which was mislabeled as 100% pure orange juice. Plaintiffs seek to punish the defendant for that misrepresentation, as the juice contained some additional ingredients." Nothing in the record is cited in support of this statement.

In fact, plaintiffs allege that Bodine's, Inc. put evaporator waste water, monosodium glutamate, and other low-cost ingredients in its "orange juice." (Cmplt., ¶¶ 26, 39) "Orange drink" is a product defined by the FDA; we are not aware of *any* product that is permitted to have the "ingredients" that Bodine's, Inc. put in its "product." Certainly, the authors of the "amicus" brief cite nothing to support the proposition that it is permissible to sell what Bodine's, Inc. is alleged in the complaint to have sold.

2. Page 2 of the motion further states that "Plaintiffs have no plausible plan to reimburse or even identify" the class members. No support for this statement is cited and none exists.

3. Page 2 of the motion asserts that "named plaintiffs suffered somewhere between about 30¢ and $2 each in damages during the mid-1980s." This statement is not true. No support for the statement is cited and none exists in the record.

4. Page 2 of the motion states that "Plaintiffs do not intend to notify [class members] of this action either by mail or by publication." This is incorrect.

5. Page 2 of the motion asserts that "members of the class are not expected to make individual claims or receive compensation." This is incorrect. Plaintiffs have consistently maintained that class members must be given an opportunity to file claims.

6. Page 3 of the motion states that "Plaintiffs plan to figure damages based on the manufacturing costs of an orange juice drink as compared with 100% juice." Nothing is cited for this proposition. It is incorrect.

7. On page 2 of the "amicus" brief, the authors state:

> In 1985, Bodine's Inc. was sold. The buyers knew nothing of the company's past deeds. The new owners have always produced pure juice products, all accurately labelled.

Nothing is cited in support of this statement. Nothing exists. The knowledge of the buyers is a question of fact that has not been resolved. Furthermore, litigation is pending in which the new buyers are attempting to transfer the juice business back to the former owners. The juice production of Bodine's, Inc. after 1985 is not in issue; it is certainly inappropriate to state as a "fact" that they have accurately labelled everything.

8. On page 2 of the "amicus" brief, the authors state that plaintiffs "seek the difference between the 100%

pure juice they paid for and the orange drink mixture they received." This is another fabrication. Plaintiffs do not contend that they purchased "orange drink mixture." They contend that they purchased worthless, adulterated, garbage.

9. On page 2 of the "amicus" brief, the authors state that under "fluid recovery" plaintiffs can "proceed with the lawsuit without notifying any other class members."

Nothing is cited in support of this statement. Nothing exists. Plaintiffs have not addressed the appropriate form of notice because proceedings in the trial court have been stayed pending resolution of the instant appeal. At no time have plaintiffs addressed the need for notice, much less disclaimed it. The authors of the "amicus" brief are simply attempting to mislead the court.

10. On page 3, the "amicus" states that any amounts not paid to the named plaintiffs "will not be transferred to members of the class. Instead, it is earmarked for some project considered beneficial to orange juice consumers in general . . . ."

This is another misstatement of the record and of plaintiffs' position. The trial court's order found that *many* of the class members would not be able to prove their purchases through documentary evidence. However, *some* can – several of the named plaintiffs still have coupons, labels and Uniform Product Codes (the bar code found on most grocery packages), which they collected in connection with promotional offers. Plaintiffs stated in their Illinois Appellate Court brief:

> Once the gross damages are computed, class members can file proofs of claim setting forth their purchases of the affected orange juice products and providing any documentation of the purchases that

> was retained (such as several of the named plaintiffs kept). If the claims do not exhaust the total recovery, the balance can be placed in a fund for the purpose of reducing the prices on the affected orange juice products. (Brief of Plaintiffs-Appellees, p. 7)

11. On page 6, the authors of the "amicus" brief state that the trial court "summarily found that the named plaintiffs adequately represent the class . . . ." The trial court did not "summarily" find anything. The class issue was extensively briefed; all the plaintiffs were deposed.

12. At page 7, the authors of the "amicus" brief state that "Named plaintiffs . . . are merely ornamental, enabling their attorneys to bring the lawsuit." The fact is that most of the named plaintiffs joined this lawsuit after it was filed, upon reading about it in the press, because they felt that they had been imposed upon. The addition of the plaintiffs is in the record. They testified to their reasons for joining the action in their depositions.

13. At page 8 of the "amicus" brief, the authors state that there can be no assurance that any reduction of orange juice prices will be borne by Bodine's, Inc. As usual, nothing is cited in support.

It is possible to insure that Bodine's, Inc. will bear the burden of a price reduction by using coupons. The "amici" are undoubtedly aware of this.

14. On page 9 of their brief, the "amici" state that "significant defense costs as a result of this very lawsuit" must be passed on to consumers through a price increase. This is another inaccurate statement. Bodine's ability to raise prices is constrained by competition.

15. On page 9, the "amici" state that the "unclaimed portion of the damage fund" will be "about 99 percent

of it." No basis for this figure is stated. None exists. It is a pure fabrication or speculation.

16. On page 11, the "amici" state that it will cost "$50 to recover 50 cents." Again, no basis for this figure is stated. None exists.

17. On page 12 of their filing, the "amici" state that "Plaintiffs admit . . . the total money damages being sought are not based on compensation proportionate to plaintiffs' injuries. These plaintiffs are asking for blood." Most of the quoted statement is italicized.

Again, the "position" attributed to plaintiffs is a complete fabrication. Plaintiffs' Appellate Court brief explained (p. 4) at length how "it is possible to determine how much defendants made through their illegal activities, or how much they saved by comparing the cost of the adulterated materials to the cost of the ingredients of orange juice."

18. The decision in *Cicielski v. Sears, Roebuck & Co.*, 132 Mich.App. 298, 348 N.W.2d 685 (1984), did *not* hold what the "amicus" claims. The "findings" that the "amicus" refers to were findings of the Michigan trial court, which rejected fluid recovery. The appellate court in *Cicielski* rejected the position of the trial court, and held that fluid recovery was not impermissible. However, based on grounds *other* than those relied upon by the trial court, it determined that fluid recovery was not necessary or appropriate in the particular case. The reason was that the defendants had relied on official interpretations which allowed their methods of interest calculation.

* * *

The "amicus" motion and brief are disrespectful to the Court. They do not seek to place before the Court anything that belongs in an *amicus* brief. They seek to misstate the record in this case. The parties are quite capable of advising the Court of the contents of the record in this case. If Petitioner are not willing to make the statements set forth in the "amicus" papers, because they are false and sanctionable, such statements should not be placed before the Court through a surrogate.

The *only* statement in the "amicus" papers that is at all "relevant" is the statement on p. 3 that *amici* are concerned that the opinion of the Illinois Appellate Court "will completely reverse settled class action law in Illinois . . . ." This statement explains in a nutshell why this Court should *not* grant review in this matter. Illinois can shape its law as it sees fit, as long as it complies with federal constitutional requirements.

As set forth in our opposition to the petition for certiorari, no significant federal constitutional issue is presented in this matter.

CONCLUSION

The "amicus" motion and brief are wholly inappropriate. Leave to file should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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